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In the Supreme Court of the United States

OCTOBER TERM, 1983

A.D.M. CORP.
Petitioner
against
ARTHUR J. THOM SON
and
FROST CONTROLS, INC.
Respondents

UNITED ELECTRONICS COMPANY
Petitioner
against
ARTHUR J. THOM SON
and
FROST CONTROLS, INC.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

IN RE: A.D.M. CORP., PETITIONER

1. Whether S.E.C. Rule 144, 37 Fed. Reg. 591 (January 14, 1972), 17 CFR 230.144 (A-60 - 107) had the "force and effect of law" binding upon the Courts below as to definition of "underwriter" as applied to Factors' public offer for sale on October 21, 1973 of the unregistered Frost Corp. securities and also as applied to Factors' purported public sale of same to itself on October 26, 1973?

2. Whether Factors was an "underwriter" as defined by Securities Act of 1933 Section 2(11) and S.E.C. Rule 144, 17 CFR 230.144?

3. Whether the Court of Appeals acted in violation of the separation of powers by judicially legislating several independent definitions of "underwriter" through use of its phrase "as well as" in substitution for the statutory word "or", enacted by Securities Act of 1933 Section 2(11), 15 U.S.C. Section 77b(11) and adopted by the S.E.C. by 17 CFR 230.144 (Underscoring supplied.)

4. Whether the S.E.C. through its Rule 144 has expressed a strong public policy against the public offer and/or public sale of unregistered securities by good faith pledgees lacking an exemption or lacking compliance with S.E.C. Rule 144?

5. Whether the Court of Appeals erred in its conclusion that "If there is a public policy against good faith pledgees offering collateral (consisting of unregistered shares) at a foreclosure sale to the public, it is not a strong one"?

6. Whether the Court of Appeals breached its obligations pursuant to FRCP 52 by making unsupported, erroneous inferences of transfer to Factors of legal title to the Frost Corp. securities upon its "de novo" and controlling findings and conclusions that "the contract is not executory; the sale is complete, all parties have relied upon its validity; ..." [A-6] and by erroneously concluding therefrom that in the District Court action plaintiff A.D.M. Corp. sought to set aside an 'executed contract of sale and transfer of title' which would not be permitted?

QUESTIONS PRESENTED

IN RE: UNITED ELECTRONICS COMPANY, PETITIONER

7. Whether the Court of Appeals erred as to its obligations pursuant to FRCP 52 by its failure or refusal to remand to the District Court for findings pursuant to FRCP 52 and thereby condoned the District Court's total, deliberate failure, omission, and refusal to make findings as to essential and substantial facts as to UED's claims against Thomson for breach of fiduciary obligations owed it, arising from Thomson's substantial and deliberate course of conduct wherein he acted hostilely and inimicably to the interests of his principal, UED, in furtherance of his self-motivated pursuit to acquire the Frost Corp.'s assets for himself and in direct competition and derrogation of UED's claims, efforts, and rights to restore the Frost Corp.'s stock and assets to its possession and control?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Angelo M. Torrisi as counsel for A.D.M. Corp. and United Electronics Company, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this Case.

OPINIONS BELOW

The opinion of the District Court [A-25 - 41] has not been officially reported. The opinion of the Court of Appeals [A-1 - 9] is reported at 707 F.2d 25 (1983).

JURISDICTION

The judgment of the Court of Appeals was entered on May 24, 1982 [A-9]. The order denying A.D.M. Corp.'s and United Electronics Company's petition for rehearing was entered on June 17, 1983 [A-24]. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Administrative Procedure Act 5 U.S.C. 551 and 553 are set forth in Appendix A-109 - 112; the pertinent provisions of the Securities Act of 1933 Sections 1, 2, 4, 5, and 19, 15 U.S.C. Sections 77a, 77b, 77d, 77e, and 77s are set forth in Appendix A-109 - 121.

RULES INVOLVED

The pertinent provisions of S.E.C. Rule 144, 17 CFR 230.144 as adopted by publication 37 Fed. Reg. 591 (January 14, 1972) are set forth in Appendix A-60 to A-107. The pertinent provisions of FRCP Rule 52 are set forth in Appendix A-108.

STATEMENT

IN RE: A.D.M. CORP., PETITIONER

Prior to October 21, 1974 petitioner had been known as Frost Controls Corp. (Frost Corp.) and on that date defendant Thomson, petitioner's former president and director, caused petitioner's name

to be changed to A.D.M. Corp. concurrent with a transfer of all of Frost Corp.'s assets to Thomson and his alter ego, Frost Controls, Inc. (Frost, Inc.), which he had caused to be formed for this purpose.

Petitioner Frost Corp., plaintiff, brought the principal action against Thomson to recover damages for breach of fiduciary duties owed by him to Frost Corp. and also to recover for its assets transferred to Thomson and his alter ego, Frost, Inc., under claim that the transfer of October 21, 1974 was invalid, was made without authority, Frost Corp. claiming that the title to Frost Corp.'s stock at all times was in its corporate parent, UED, which had neither participated in the transfer by Thomson to himself nor had UED approved or authorized the transfer.

In his defense to the action, Thomson has claimed that as of October 21, 1974 equitable title to the Frost Corp.'s securities was in Factors and Note Buyers Inc. (Factors), which claims to have acquired same by virtue of a bulk bid for all the assets offered on an auction sale on October 26, 1973, which Factors as secured party had caused to be held and at which Factors made the highest and successful bulk bid. Thomson claims that the transfer of Frost Corp.'s assets to himself was made with the authority and approval of Factors' directors.

RE: LEGAL TITLE TO FROST CORP. SECURITIES

From the date of original issue, March 15, 1971, to date, UED was and has been sole record and registered owner of the Frost Corp. securities and held undisputed legal title to same [A-122, III, IV, V].

Legal title to the Frost Corp. securities was transferable only upon the books of the corporation upon surrender of the certificate properly endorsed [A-122 - X] and Factors admitted that it had never surrendered the certificate for transfer, nor did it ever request transfer or make any efforts to transfer title of the Frost Corp. securities to its own name [A-128, CVI, CVII]. Thus, any claims as Factors may have had to the legal title of the Frost Corp. securities had never been reduced to record title and any such claims of title were, at best, solely of an executory nature only.

RE: EQUITABLE TITLE TO THE FROST CORP. SECURITIES

Factors claimed to have acquired equitable title to the Frost Corp. securities by its successful bulk bid at the October 26, 1973 public foreclosure sale which it conducted. In its opinion the District Court found Factors public sale to itself of the unregistered Frost Corp. securities to be exempted from Section 5 registration requirements and thereby concluded that the sale to itself was legal and concluded that Factors thereby acquired equitable title to the Frost Corp. securities.

UED as corporate parent of Frost Corp. was legal and beneficial owner of all of its issued and outstanding securities, which were unregistered. On June 1973 UED pledged its Frost Corp.'s stock concurrent with a pledge of substantial machinery, equipment, inventory to a lender called Factors. When the loan went into default, Factors foreclosed on all of the collateral, offering for forced sale publicly on October 26, 1973 all of the machinery, equipment, inventory, as well as the unregistered Frost Corp. securities and other collateral. Factors presented the successful bulk bid and claims to have acquired title to all the assets offered.

There is no dispute that Factors' foreclosure sale was valid and effective insofar as transfer of title to the tangible assets- machinery, equipment, inventory, etc. may be concerned and it is conceded that Factors acquired full legal title to same; however, Factors' claim of acquisition of title by foreclosure sale to itself of the Frost Corp.'s stock is vigorously disputed.

At trial Frost Corp. argued that the public offer for sale by Factors of the unregistered Frost Corp.'s securities on October 21, 1973 (by advertisement published in the Newark Star Ledger) was in violation of Section 5(c) of the Act was therefore an illegal, and improper means of sale.

At trial, plaintiff Frost Corp. argued that Factors committed an illegal act in violation of Section 5(c) of the Act when it offered for public sale on

October 21, 1973 the unregistered Frost Corp.'s securities; having committed such an illegal act, Factors would not be permitted by the Courts of Equity of New Jersey to acquire equitable title to the Frost Corp.'s securities by taking advantage of its own prior illegal act and by commission of yet another illegal act, namely, the illegal public sale to itself on October 26, 1973 at the forced foreclosure sale which it caused to be conducted.

Thus, at trial, the issue whether there was or was not a transfer of equitable title of the Frost Corp. securities was reduced simply to considerations as to the legality or illegality of the means of offer and/or sale employed by Factors. If the means were legal, then Factors could acquire equitable title and consequently Factors could have and did authorize sale and transfer of Frost Corp.'s assets to Thomson and Frost Inc.; or alternatively, if the means were illegal, then Factors did not acquire equitable title and consequently it could not have authorized the sale and the transfer of assets to Thomson was illegal and improper.

The legality or illegality of the offer for sale turns upon the definition of "underwriter" within the meaning of the Securities Act Section 2(11). If Factors was not an "underwriter", then it was entitled to an exemption pursuant to Section 4(1) and the offer for sale and/or the sale to itself on October 26, 1973 would not have violated the registration requirements of Section 5; the sale to itself would have been legal and

Factors would have acquired equitable title to the Frost Corp. securities. To the contrary, if Factors was an "underwriter" within the meaning of Section 2(11), then the exemption provided by Section 4(1) would not have been available and the offer for sale and the purported sale to itself were in violation of the registration requirements of Section 5, illegal, and therefore Factors did not acquire equitable title to the Frost Corp. securities.

Thus, in the action below Frost Corp., plaintiff/petitioner, did not seek nor did it bring the action below for the purpose of obtaining remedy or relief under the Securities Act of 1933; references to the Securities Act of 1933 and Rule 144 are solely for the purpose of obtaining judicial determination or judicial declaration as to the legality or illegality of Factors acts of offer for sale on October 21, 1973 and Factors purported public sale to itself on October 26, 1973.

---

1. Rule 144 has "force and effect of law" as to definition of "underwriter".

This Court in the course of its opinion in Chrysler Corp. v. Brown, Secretary of Defense, et al, 441 U.S. 281 (1979) had occasion to review the principles applicable to these issues and for convenience we refer to and quote from various portion of this opinion. On the issue of "substantive rule" at page 302 this Court stated:

> "... in Morton v. Ruiz, 415 U.S. 199 (1974), we noted a characteristic inherent in the concept of a 'substantive rule.' We described a substantive rule--or a 'legislative-type rule,' id., at 236--as one 'affecting individual rights and obligations.' Id., at 232. This characteristic is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.' Id., at 235, 236."

And further at page 302, note 31, this Court in referring to the fact it had given some weight in prior cases to the Attorney General's Manual on the Administrative Procedure Act (1947), stated:

> "The Manual refers to substantive rules as rules that 'implement' the statute. 'Such rules have the force and effect of law.' Manual, supra, at 30 n. 3"

Any inquiry as to the scope and purposes of Rule 144 should first note that the Commission has entitled Rule 144 as a "Definition of Terms 'Underwriter' and 'Brokers' Transactions'" [A-60] and significantly the Commission states that:

"Rule 144 is designed to implement the fundamental purposes of the Act as expressed in its preamble:

'To provide full and fair disclosure of the character of the securities sold in interstate commerce and through the

mails, and to prevent fraud in the sale thereof * * * '" [A-65]

Rule 144 was adopted by the Commission pursuant to statutory authority under the Securities Act of 1933 Section 19a, 15 U.S.C. 77s. The Commission's action was undertaken carefully over a period of several years in the course of which and in compliance with the requirements of 5 U.S.C. Section 553(b) the Commission gave public notice of its proposed rule making by publication at 35 Fed. Reg. 15447, Saturday, October 3, 1970, and concurrently invited all interested parties to submit their views and comments on the proposed rule, in writing, for public inspection, Commission's study, and consideration. The Commission carefully considered the comments and as required by 5 U.S.C. Section 553(c) incorporated results of these comments into the publication of adoption of Rule 144, which was effected by publication at 37 Fed. Reg. 591, January 14, 1972 (more than 30 days prior to April 15, 1972, the effective date of Rule 144.) [A-60, A-62, A-107].

The substantive importance of Rule 144 is readily apparent from a reading of same [A-60 - 107]; the Commission scrupulously adhered to its statutory requirements for rule making under 5 U.S.C. Section 553 and there has never been any challenge raised as to the validity of enactment of this very important Rule.

In Securities and Exchange Commission v. Torr, 15 F. Supp. 144, an early case arose to consider the Commission's

power to make rules; the District Court held that Congress having conferred upon the Commission the power to make a particular rule, since such rule did not invade some rights of defendant, then such rule would not be interfered with by the Court; as it is not within the province of the Court to pass on wisdom of the rule as adopted by the Commission.

This Court in Chrysler Corp. v. Brown, supra, when considering the broad questions of grants of legislative authority to a federal agency as sufficient to be binding upon Courts in a manner 'akin to statutes' at page 308 stated:

"What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued. Possibly the best illustration remains Mr. Justice Frankfurter's opinion for the Court in National Broadcasting Co. v. United States, 319 U.S. 190 (1943). There the Court rejected the argument that the Communications Act of 1934 did not give the Federal Communications Commission authority to issue regulations governing chain broadcasting beyond the specification of technical, engineering requirements. Before reaching that conclusion, however, the Court probed the language and logic of the Communications Act and its legislative history. Only after this careful parsing of authority did the Court find that the regulations had the force of law and were binding on the courts unless they were arbitrary or not promulgated pursuant to prescribed procedures.

> 'Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.' Id., at 224."

Rule 144 is a "substantive rule" designed to "implement" the Securities Act of 1933 [15 U.S.C. 77a et seq], adopted by the Commission January 14, 1972 in exercise of its statutory authority [15 U.S.C. 77s] and in compliance with Administrative Procedure Act 15 U.S.C. Section 553; Rule 144 had the "force and effect of law" binding upon the Courts below as to definition of "underwriter" applicable to Factors' acts of October 21-26, 1973.; constitutionally, under the separation of powers doctrine, Courts are limited both as to scope of review and/or application of the Rule.

2. Factors was an "underwriter as defined by Securities Act of 1933 Section 2(11) and S.E.C. Rule 144, 17 CFR 230.144.

On October 21, 1973 Factors offered for public sale the unregistered shares of Frost Corp. for UED, issuer.

On October 26, 1973 Factors purportedly sold to itself at a public sale the unregistered shares of Frost Corp. for UED, issuer.

For convenience, the pertinent provisions of Section 2(11) are set forth herein:

> "2(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security ... " (Underscoring supplied.)

In its notice of adoption of Rule 144 the S.E.C. carefully states:

"Moreoever, the Commission hereby emphasizes and draws attention to the fact that the statutory language of Section 2(11) is in the disjunctive. Thus, it is insufficient to conclude that a person is not an underwriter solely because he did not purchase securities from an issuer with a view to their distribution. It must also be established that the person is not offering or selling for an issuer in connection with the distribution of the securities." [A-68]

Again, in the preliminary note to Rule 144 the S.E.C. emphasizes the foregoing by stating [A-91 - 92]:

"It should be noted that the statutory language of Section 2(11) is in the disjunctive. Thus, it is insufficient to conclude that a person is not an underwriter solely because he did not

purchase securities from an issuer with a view to their distribution. It must also be established that the person is not offering or selling for an issuer in connection with the distribution of the securities, does not participate or have a direct or indirect participation in any such undertaking, and does not participate or have a participation in the direct or indirect underwriting of such an undertaking.

Both Section 2(11) and the pertinent provisions of Rule 144 above quoted are clear and unambiguous in application to Factors of the status of "underwriter". As this Court noted in Rubin v. U.S., 449 US 424 at page 430:

> "When we find the terms of a statute unambiguous, judicial inquiry is complete, except "in 'rare and exceptional circumstances'." TVA v. Hill, 437 U.S. 153, 187, n.33 (1978) (quoting Crooks v. Harrelson, 282 U.S. 55, 60 (1930)). Accord, Aaron v. SEC, 446 U.S. 680, 695 (1980); Ernst & Ernst v. Hochfelder, supra at 214, n.33."

The S.E.C. has long used definition of "underwriter" as an essential tool in enforcement of the policies of the Securities Act of 1933 and because of this very special experience and familiarity with the term "underwriter", in its notice of adoption of Rule 144 the S.E.C. took particular care to note that:

> "Not so well understood is the fact that individual investors who are not professionals in the securities

> business may be "underwriters" within the meaning of that term as used in the Act if they act as links in a chain of transactions through which securities move from an issuer to the public." [A-67]

3. Court of Appeals erred by legislating change of definition of "underwriter" for Section 2(11) and Rule 144.

For convenience the pertinent portions of the Court of Appeals' opinion [A-3] are repeated as follows:

> "Section 2(11) of the Act defines "underwriter" broadly to include one who "has purchased from an issuer [or from one who controls an issuer] with a view to ... the distribution of any security" as well as one who "sells for an issuer [or for one who controls an issuer]." Id. at Section 77b(11)." (Underscoring supplied.) [A-3]

The foregoing may be compared with the pertinent provision of the Act:

> " 2(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security ...." (Underscoring supplied.) [A-115]

By comparison of the foregoing two definitive provisions, it appears that the Court of Appeals has judicially legislated a change in the definition of

"underwriter" firstly by substituting the use of its words of definition "to include one who" in place and instead of the words of definition as used by Congress: "means any person who" and secondly by substituting use of its words "as well as" in place and instead of the word used by Congress: "or" to legislate the availability of a choice of subjective and objective independently sufficient definitions for "underwriter" in substitution for the rigidly disjunctive definition of "underwriter" which Congress had legislated at enactment of the Securities Act of 1933, which requires concurrent application of both subjective and objective tests for "underwriter".

The Court of Appeals neither claims to have interpreted the original statute 2(11) nor even Rule 144, each of which define "underwriter" as disjunctive; the Court of Appeals simply took the liberty of changing by substitution the controlling words in both the statute and Rule 144 and concentrated solely upon the subjective standards employed by the District Court.

In its opinion and by way of expanding upon these changes the Court of Appeals stated further:

> "The district court, believing that Factors was not an underwriter and that Section 4(1) of the Securities Act, id. at Section 77d(1), therefore exempted the sale, found for defendants. ... [A-3]
>
> There is considerable support for the district court's view that a

> good faith pledgee who sells unregistered shares at a foreclosure sale is not an "underwriter"" [A-4]

Continuing its loosely developed definition of "underwriter" as applied to Factors and the facts at bar and speaking in support of the District Court's application of only subjective standards to achieve its findings that Factors was not an "underwriter", the Court of Appeals stated further:

> "The district court properly found that Factors did not enter into the pledge arrangement with an eye toward reselling the Frost shares to the public; indeed, the shares ended up in Factors' own hands." [A-6]

And thereby gave support to application of subjective standards only as a fully sufficient test and definition for "underwriter". Both the Court of Appeals and the District Court were satisfied to ignore application of the objective standards also available in 2(11) and Rule 144 and required by definition to be applied disjunctively.

In this approach to the definition of "underwriter" the Court of Appeals has ignored Rule 144's explicit emphasis that the statutory language is in the disjunctive [A-68 - 91] and that both subjective and objective tests are available and must be applied in definition of "underwriter".

A better understanding of the Commission's emphasis upon the disjunctive use of subjective and objective standards is found in the Commission's

explanation as to the background and purpose of Rule 144 as follows:

"Rule 144, together with the other related rules and amendments, is designed to provide full and fair disclosure of the character of securities sold in trading transactions and to create greater certainty and predictability in the application of the registration provisions of the Act by replacing subjective standards with more objective ones." [A-68]

In the course of its opinion the Court of Appeals speculates extensively as to what the Commission might or might not have done in enforcement proceedings; but significantly at no point in its decision does the Court of Appeals refer to or even acknowledge the compendious definitions of "underwriter" developed by the Commision or even the very existence of Rule 144, which is binding upon it "with the force and effect of law".

Perhaps the Court of Appeals questioned the wisdom of the Commission's definition of "underwriter" in Rule 144; perhaps it would have preferred a different definition for "underwriter" than that developed by the Commission in Rule 144. However, it was not the province of the Court of Appeals to judicially legislate a change in either 2(11) or Rule 144; nor was it the province of the Court of Appeals to reject totally <u>by omission</u> this very important rule adopted by the Commission and to refuse to be bound by Rule by avoiding same. Congress granted legislative power to the Commission to enact Rule

144 and unless the rule be shown to be arbitrary or capricious, the Courts are bound by it with the "force and effect of law". See Chrysler Corp. v. Brown, supra; National Broadcasting Co. v. United States, 319 US 190 (1943).

4 and 5. S.E.C.'s Rule 144 supports strong policy against distribution of unregistered securities and creation of public markets by issuers by any means including sales by bona fide pledgees unless exempt or in compliance with Rule 144. The Court of Appeals erred in classification of this policy as "not a strong one".

Any Securities Act inquiry as to public policy should note that protection of the investor is paramount and as this Court has noted in S.E.C. v. Ralston Purina Co., 346 US 119 at page 124:

> "The design of the statute is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions."

Similarly, Rule 144 is designed to implement these fundamental purposes of the Act and towards this end, Rule 144 states:

> "First, the purpose and underlying policy of the Act to protect investors requires, in the Commission's opinion, that there be adequate current information concerning the issuer, ..." [A-69]

And as a corollary to the above, at least twice within Rule 144 [A-65 and A-89], the Commission notes:

"The rule is designed to prohibit the creation of public markets in securities of issuers concerning which adequate current information is not available to the public."

Within Rule 144 pledgees are treated equally with all other potential sellers of unregistered securities; they are accorded no special privileges and are required to comply with Rule 144 or be otherwise statutorily exempt from registration requirements.

The public policy is strong, except that Rule 144 is designed to facilitate an orderly distribution of limited quantities of unregistered securities under conditions assuring availability of adequate public information to the investing public.

If bona fide pledgees were to be accorded a special, privileged status, and be set free of Section 5 registration requirements without specific exemption, then such bona fide pledgees could in fact create the public markets in securities of issuers concerning which adequate information is not available to the public; such special treatment to bona fide pledgees would thwart the very purposes of the Act.

In S.E.C. v. Guild Films Co., 279 F 2d 485 (2d Cir 1960), bona fide pledgee banks made similar argument and the words of the Court at page 490 are of particular note:

> "The banks have contended that they were "bona fide pledgees" and therefore "entitled upon default to sell the stock free of restrictions." They assume that "good faith" in accepting the stock is a sufficient defense. See Loss, Securities Regulation, 346 (1951). But the statute does not impose such a "good faith" criterion. The exemption in Section 4(1) was intended to permit private sales of unregistered securities to investors who are likely to have, or who are likely to obtain, such information as is ordinarily disclosed in registration statements. See S.E.C. v. Ralston Purina Co., 1953, 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494. The "good faith" of the banks is irrelevant to this purpose. It would be of little solace to purchasers of worthless stock to learn that the sellers had acted in "good faith." Regardless of good faith, the banks engaged in steps necessary to this public sale, and cannot be exempted."

The Court of Appeals erred by its classification of public policy as to public sale by bona fide pledgees in foreclosure as "<u>not a strong one</u>"

6. Contrary to provisions of FRCP 52, Court of Appeals erred by making "de novo" controlling findings and inferences as to the assumed state of contract of sale, transfer of title to Frost Corp. securities, nature of relief sought by Plaintiff, unsupported and contrary to trial record and Trial Court opinion.

In the course of the trial in the District Court the issues as to title to the Frost Corp. securities had been clearly developed and the sole issue before the Court was whether or not Factors had acquired equitable title to the Frost Corp. securities. As the statement set forth at page 4 shows, it was clearly established and without dispute that at all times the legal and record title to the Frost Corp. securities was in UED. While Factors claimed to have purchased at the secured party sale which it conducted on October 26, 1973, Factors did not ever claim that its purchase was executed, but conceded it as executory, but nonetheless claimed it to be sufficient to give it equitable rights to the title.

Factors admitted that it had never requested transfer of title nor did it make any efforts to cause the transaction of purchase to be executed by transfer to itself record title to the securities.

Examination of the opinion in the District Court substantiates the foregoing and nowhere in the opinion is there a hint or reference to anything

but issue as to equitable title to the Frost Corp. securities, which in turn was the very basis of inquiry by the District Court as to the legality or illegality of the offer or means of sale with a consequential and resultant inquiry into the Securities Act issues involving the definitions of "underwriter", etc.

FRCP 52 does not authorize the Court of Appeals to infer material facts nor may the Appellate Court make any controlling inference which the Trial Court has not made and which, if made, would in effect constitute a trial "de novo". Zenith Radio Corp. v. Hazaltine Research Inc., 395 US 100 (1969), Transport Equipment Corp. v. Guaranty State Bank, 518 F 2d 377 (10th Cir. 1975), Hodgson v. Okada Farms Inc., 472 F 2d 965 (CA 10th Cir. 1973)

REASONS FOR GRANTING PETITION.

Prior to Rule 144, subjective standards had been applied in definition of the term "underwriter". Rule 144 was designed to make a clear break with these subjective standards of the past and sought to establish and apply objective criteria. To this extent, the Commission concentrated on the phrase "or offer or sells for an issuer in connection with the distribution of any security" as a means of directing the rule to more objective standards than those previously available. A helpful critique of the rule has been provided by Dan L. Goldwasser, see A Guide to Rule 144, Second Edition, PLI 1978, who interestingly observes at page 20:

> "The validity of the Rule has never been tested in the courts, and in view of its present general acceptance by the securities bar, a judicial challenge now appears unlikely."

The instant decision by the Court of Appeals, while it never mentions Rule 144, represents a substantial departure from the last ten years of satisfactory operation of the rule. The Court of Appeals' insistence that public policy as applied to sales of unregistered securities by bona fide pledgees is "not a strong one" will lend comfort to those who would employ pledgees as a means of distribution of unregistered securities. The insistence by the Court of Appeals that subjective standards are properly applied to sales by pledgees is a throw back to the pre- Guild Films case, supra. The Court of Appeals opinion, if allowed to stand, represents a debilitation of Rule 144 and the Commission's continuing efforts to assure availability of adequate information. The floodgates to distribution of unregistered securities could be opened and the public offer for sale by bona fide pledgees "would afford a ready method of thwarting the policy of the law and evading its provisions." See S.E.C. v. Chinese Benevolent Association, 120 F 2d 738 (2 Cir. 1941).

Petitioner respectfully states that it is preferable to correct the weakening forces of this decision early and not to await experience of substantial harm, which would necessitate corrective action in any case.

Further, the unjustified findings and inferences made "de novo" by the Court of appeals and upon which it based its conclusion 'that plaintiff would loose in any case' represents a substantial throw back to pre- FRCP 52 days and a long since barred trials "de novo" by Courts of Appeals; this breach of FRCP 52 is substantial and should be corrected.

STATEMENT

IN RE: UNITED ELECTRONICS COMPANY
PETITIONER

The Court of Appeals erred by its failure to remand to the District Court for essential and substantial findings pursuant to FRCP 52 which the District Court had totally failed or omitted to make involving an entire course of conduct of Thomson which began immediately following the October 26, 1973 sale, which was motivated by Thomson's selfish, self-serving interest whereby he sought to acquire the Frost Corp.'s assets for himself; Thomson's conduct was hostile and inimical to the interests of his principal, UED, and in direct competition with UED's own efforts to regain Frost Corp. and its assets to its possession and control; Thomson's actions were secretive and concealed from his fellow directors, stockholders, and principals; Thomson engaged in acts of self-dealing in which he took advantage of corporate opportunities and used and diverted corporate assets to his own selfish purposes and use.

UED's claims are unrelated to other claims of Frost Corp. against Thomson for breach of duties; UED's claims against Thomson are unrelated to the issue of title involved in Frost Corp.'s claims against Thomson.

As of November 19, 1973, UED commenced efforts to regain control of the Frost Corp. securities to itself. UED's efforts continued through to June 1975 at which time through successful litigation commenced in New Jersey by UED against Factors, UED recovered the Frost Corp. securities from Factors.

As of October 26, 1973, Thomson began his course of action wherein he sought to acquire Frost Corp.'s assets to himself in competition with the efforts of his principal, UED. Thomson's actions were successful in that in October 21, 1974, he succeeded in obtaining transfer of all of Frost Corp.'s assets to himself without out of pocket disbursement by him.

7. By failure to remand to the District Court for findings pursuant to FRCP 52 the Court of Appeals has erred and condoned the District Court's total failure and omission to make essential and substantial findings as to Thomson's breach of fiduciary duties owed to UED.

By undisputed trial exhibits, UED established a prima facie case of breach of fiduciary duties owed it by Thomson. In support of the established facts UED submitted substantial proposed findings

of fact, each proposed finding was supported by appropriate exhibits, admissions, and other documentary proofs. Many of these proposed findings are included in the Appendix at pages A-122 - 147.

UED established a prima facie case of breach of fiduciary duty; upon such prima facie case the burden to show fairness shifted to Thomson and Thomson offered no evidence in defense [A-141].

Despite the foregoing the District Court failed or omitted to make even a single finding of fact essential to UED's claims.

The Court of Appeals was obliged to remand to the District Court for findings pursuant to FRCP 52, but failed to do so in breach of its obligations under FRCP 52. See State Comm'rs v. Jackson, (1931) 283 US 527; see United Shoe Machinery Corporation v. Kamborian et al, 160 F 2d 461 (1st Cir 1947); 5A Moore's Federal Practice, 52.06[1], [2].

REASONS FOR GRANTING THE PETITION

The District Court's failure and refusal to make findings as to essential facts despite extensive documented requests for such findings warrants supervisory direction by the Court of Appeals to sustain its obligations pursuant to FRCP 52. Rule 52 was adopted to assure proper orderly trials by the Courts with resultant fair treatment to all parties. Orderly conduct of Court proceedings requires proper

adherence to the rules of procedure and rights of parties.

CONCLUSION

The petition of A.D.M. Corp. for a writ of certiorari should be granted.

The petition of United Electronics Company for a writ of certiorari should be granted.

ANGELO M. TORRISI
Attorney for Petitioners

SEPTEMBER 1983

83-420

No.

SEP 13

In the Supreme Court of the United States

OCTOBER TERM, 1983

A.D.M. CORP.
Petitioner
against
ARTHUR J. THOM SON
and
FROST CONTROLS, INC.
Respondents

UNITED ELECTRONICS COMPANY
Petitioner
against
ARTHUR J. THOM SON
and
FROST CONTROLS, INC.
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES COURT OF APPEALS
For the First Circuit

No. 82-1618

A.D.M. CORP.,

Plaintiff, Appellant,

v.

ARTHUR J. THOMSON,
FROST CONTROLS, INC.,

Defendants, Appellees,

v.

GENERAL ELECTRONICS, INC., ET AL,

Third-Party Defendants, Appellees.

No. 82-1619

UNITED ELECTRONICS COMPANY,

Plaintiff, Appellant,

v.

ARTHUR J. THOMSON,
FROST CONTROLS, INC.,

Defendants, Appellees,

v.

GENERAL ELECTRONICS, INC., ET AL,

Third-Party Defendants, Appellees.

APPEALS FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Rya W. Zobel,
U.S. District Judge]

Before
Coffin, Chief Judge
Breyer, Circuit Judge
and Maletz,* Senior Judge

Angelo M. Torrisi, for A.D.M. Corp., United Electronics Company, and General Electronics, Inc.

Michael S. Gardener, with whom Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C. was on brief, for Arthur J. Thomson and Frost Controls, Inc.

May 24, 1983

BREYER, Circuit Judge. The plaintiffs in this case include a firm known as United Electronics Co. of Delaware (UED), which owned the stock of a company originally called Frost Controls Corp. (Frost). UED pledged its Frost stock to a lender called Factors and Note Buyers (Factors). When the loan went into default, Factors foreclosed on the collateral, offering it for sale publicly and then buying it itself. Thomson, Frost's president, then

---

* Of the United States Court of International Trade, sitting by designation.

formed a new company and bought Frost's assets on behalf of that corporation. UED and Frost's successor have sued Thomson and his new company. They claim that title to Frost's assets did not pass to Thomson's company and that Thomson breached a fiduciary duty to them when he formed the new company and bought the Frost assets.

1. Whatever plaintiffs' theory, it is clear that they cannot prevail unless UED, not Factors, owned the Frost stock at the time of the sale of Frost's assets. Thus, they have tried to show that Factors's foreclosure sale (to itself) of the Frost stock was invalid. To do this, they argue on appeal that Factors, in offering the Frost stock for sale, was an "underwriter" within the meaning of the Securities Act of 1933, 15 U.S.C. Section 77a et seq. Section 2(11) of the Act defines "underwriter" broadly to include one who "has purchased from an issuer [or from one who controls an issuer] with a view to ... the distribution of any security" as well as one who "sells for an issuer [or for one who controls an issuer]." Id. at Section 77b(11). Factors, they claim, is one who took from, or sold for, persons (namely, UED) who controlled the "issuer" (Frost). Since the Frost stock was unregistered, they argue that the public foreclosure sale violated Section 5 of the Act, id. at Section 77e, and thus the courts should set it aside. The district court, believing that Factors was not an underwriter and that Section 4(1) of the Securities Act, id. at Section 77d(1), therefore exempted the sale, found for defendants. Plaintiffs appeal.

There is considerable support for the district court's view that a good faith pledgee who sells unregistered shares at a foreclosure sale is not an "underwriter". The Securities & Exchange Commission itself would not recommend enforcement proceedings in the circumstances present here. See Consumers Coal Co., 1981 Fed. Sec. L. Rep. Paragraph 76,709 (Oct. 6, 1980); American Security Bank, 1980 Fed. Sec. L. Rep. Paragraph 76,407 (May 29, 1980); Coventry Care, Inc., No-Action Letter (June 14, 1979); Astro Manufacturing Co., No-Action Letter (Dec. 14, 1978); International Electronics Corp., No-Action Letter (Sept. 22, 1978); United Properties of America, 1978 Fed. Sec. L. Rep. Paragraph 81,627 (June 9, 1978); York Terrace Lessee Venture, No-Action Letter (Nov. 11, 1975); Banner Publishers Inc., No-Action Letter (Oct. 14, 1975); Hi-Port Industries, Inc., No Action Letter (Oct. 7, 1975); Ellwill Development Ltd., No-Action Letter (July 15, 1974); Narda Microwave Corp., No-Action Letter (Dec. 15, 1972); Narda Microwave Corp., No-Action Letter (Jan. 26, 1972); Vogue Instrument Corp., No-Action Letter (Dec. 17, 1971). Nonetheless, our research indicates circuit court dicta to the contrary. See SEC v. Guild Films Co., 279 F.2d 485, 489-90 (2d Cir.), cert. denied sub nom. Santa Monica Bank v. SEC, 364 U.S. 819 (1960). And this dicta, while critized, see, e.g., Fox v. Glickman Corp., 253 F. Supp. 1005, 1011-12 (S.D.N.Y. 1966); 1 L. Loss, Securities Regulation 645-51 (2d ed. 1961); 11 H. Sowards, Business Organizations, Section 4.01[3][b] & [c], has been frequently repeated, see, e.g., McClure v. First

National Bank of Lubbock 497 F.2d 490, 495 (5th Cir. 1974), cert. denied, 420 U.S. 930 (1975); SEC v. National Bankers Life Insurance Co., 334 F. Supp. 444, 456 (N.D. Tex. 1971), aff'd, 477 F.2d 920 (5th Cir. 1973); SEC v. National Bankers Life Insurance Co., 324 F. Supp. 189, 194 (N.D. Tex.), aff'd, 448 F.2d 652 (5th Cir.1971); In re Franchard Corp., 42 S.E.C. 163, 173 n.25; (1964); In re Associated Investors Securities, Inc., 41 S.E.C. 160, 165 (1962); In re Skiatron Electronics & Television Corp., 40 S.E.C. 236, 245 (1960). We need not decide this controverted and potentially far-reaching issue regarding the coverage of the Securities Act, however, for plaintiffs lose even if Section 5 of the Act applies.

The Securities Act does not by its terms automatically invalidate sales of unregistered securities in violation of Section 5. Rather, when unregistered securities are sold illegally, the Act simply grants the buyer a remedy in Section 12(1). 15 U.S.C. Section 77l(1). Moreover, the courts have consistently held that a seller cannot set aside his own unlawful contract where the contract's enforcement does not threaten public policy as manifested in the Act itself. A.C. Frost & Co. v. Coeur d'Alene Mines Corp., 312 U.S. 38, 44 (1941) (where "it definitely appears that enforcement of a contract [violating Section 5] will not be followed by injurious results, generally, at least, what the parties have agreed to ought not to be struck down"). Compare Kaiser-Frazer Corp. v. Otis & Co., 195 F.2d 838, 843 (2d Cir.) (A. Hand, J.), cert. denied, 344 U.S.

856 (1952), with Judson v. Buckley, 130 F.2d 174, 179-80 (2d Cir.) (A. Hand, J.), cert. denied, 317 U.S. 679 (1942). See also Byrnes v. Faulkner, Dawkins & Sullivan, 550 F.2d 1303, 1313 (2d Cir. 1977), General Life of Missouri Investment Co. v. Shamburger, 546 F.2d 774, 784 (8th Cir. 1976); Henderson v. Hayden, Stone Inc., 461 F.2d 1069, 1072 (5th Cir. 1972). As Judge Augustus Hand pointed out, whether or not a court should refuse to enforce "contracts made in violation of the Securities Act" depends upon whether "they are calculated to damage the investing public," and "each case must be judged upon its own special facts." Judson v. Buckley, 130 F.2d at 180.

Here the facts overwhelmingly militate in favor of treating the contract as valid. The district court properly found that Factors did not enter into the pledge arrangement with an eye toward reselling the Frost shares to the public; indeed, the shares ended up in Factors' own hands. The contract is not executory, the sale is complete, all parties have relied upon its validity, and no investor has been injured by the lack of a registration statement. If there is a public policy against good faith pledgees offering collateral (consisting of unregistered shares) at a foreclosure sale to the public, it is not a strong one. As noted above, the SEC presently allows such public sales under similar circumstances, and the Uniform Commercial Code encourages public sales, see, U.C.C. Section 9-504(3). Under these circumstances, whether or not the pledgee's sale was illegal under Section 5 of the

Securities Act, a court should not void the sale at pledgor's request. A. C. Frost & Co. v. Coeur d'Alene Mines Corp., supra.

2. The defendant Thomson appeals the district court's decision that he is not entitled to indemnification by the corporation formerly controlling Frost (including a plaintiff corporation) for his expenses in this suit. Thomson introduced evidence that one of these corporations has a by-law which provides for indemnification of "any person who may have served at this corporation's request as a director or officer of another corporation in which this corporation owns shares of stock" if that individual incurred expenses "by reason of being or having been . . . [an] officer . . . of such other corporation," as long as he was not adjudged to have been negligent or to have engaged in misconduct. The other corporation apparently has a similar by-law.

In our view, the corporations' by-laws must be read in light of the relevant law of the states in which the corporations were incorporated. See, e.g., 13 Fletcher Cyclopedia of the Law of Corporations Sections 6045.1-6045.3 (1980). New Jersey, one of those states, specifically requires any of its corporations to "indemnify a corporate agent against expenses to the extent that such corporate agent has been successful in any proceeding" involving him "by reason of his being or having been such a corporate agent," so long as the agent "acted in good faith and in a manner he reasonably believed to be in

or not opposed to the best interest of the corporation." N.J. Stat. Ann. Section 14A:3-5(2), (3), (4). A "corporate agent" is defined to include one who serves as an "officer, . . . employee or agent of any other enterprise, serving as such at the request of the indemnifying corporation." Id. at Section 14A:3-5(1)(a). Delaware, the other relevant incorporating state, has a very similar statute. See Del. Code Ann. tit. 8, Section 145, E. Folk, The Delaware General Corporation Law 98-99 (1972), Merritt-Chapman & Scott Corp. v. Wolfson, 321 A.2d 138, 141 (Del. Super. 1974) (president of subsidiary entitled to indemnification from parent).

Thomson fits within the scope of these statutes. He was asked to manage Frost by the president of both controlling corporations. He was sued for a breach of a fiduciary duty; thus his legal expenses arise "by reason of his being" an "officer, . . . employee or agent" of Frost. N.J. Stat. Ann. Section 14A:3-5(1) to (4); see Merrit-Chapman & Scott Corp. v. Wolfson, 321 A.2d at 142. And, he was successful on the merits. Moreover, the district court's findings as to the legitimacy of the sale to Factors preclude the possibility that Thomson acted in bad faith or in a manner "opposed to the best interests of the corporation." N.J. Stat. Ann. Section 14A:3-5(2) & (3). Consequently, the judgment below is reversed in so far as it disallows indemnification, and the case is remanded for a determination of the amount of an appropriate award.

In light of the additional and unnecessary work to which defendants

have been put by plaintiffs' brief on appeal, double costs are awarded to defendants with respect to the plaintiffs' appeal. Ordinary costs are awarded to Thomson with respect to his own appeal. See Fed. R. App. Proc. 38; Greylock Glen Corp. v. Community Savings Bank, 656 F.2d 1, 5 (1st Cir. 1981).

The judgment of the district court is affirmed, except that the portion of the judgment dealing with the appeal of Arthur J. Thomson is reversed and remanded.

[COURT OF APPEALS - CAPTION]

JUDGMENT
Entered May 24, 1983

These causes came on to be heard on oral argument from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows.

The judgment of the District Court is affirmed except that portion of the judgment dealing with the appeal of Arthur J. Thomson is reversed and that part of the judgment is remanded to the District Court for further proceedings consistent with the opinion filed this day.

Double costs are awarded to defendants with respect to the plaintiffs' appeal. Ordinary costs are awarded to Thomson with respect to his own appeal.

By the Court:

Francis P. Scigliano
Clerk

[COURT OF APPEALS - CAPTION]

PETITION FOR REHEARING IN BANC
BY PLAINTIFF-APPELLANTS A.D.M. CORP.
AND UNITED ELECTRONICS COMPANY,
BY THIRD PARTY DEFENDANT-APPELLEE
GENERAL ELECTRONICS, INC.

IN BANC REQUEST

The appellants A.D.M. CORP. and UNITED ELECTRONICS COMPANY and appellee GENERAL ELECTRONICS, INC. respectfully request this Court, under Rule 35 of the Federal Rules of Appellate Procedure, to hear this Petition for Rehearing by the Court of Appeals in banc.

It is believed that this request should be acceded to:

for the reasons that in the matter of the appeal by A.D.M. Corp. (#82-1618) several questions of unusual importance are involved:

> Is the public offer for sale by a good faith pledgee in foreclosure of collateral of unregistered shares of an issuer an illegal offer to sell said shares in violation of Section 5(c) of the Securities Act of 1933, 15 U.S.C. Section 77c?
>
> Does such public offer for sale by a pledgee to sell publicly the unregistered shares of an issuer without either compliance or an exemption from the disclosure requirements of Section 5 contravene the public policy of the Securities Act of 1933?

Is a good faith pledgee who offers to sell publicly the unregistered shares of an issuer an underwriter within the meaning of Section 2(11) of the Securities Act of 1933, 15 U.S.C. Section 77b(11)?

and for the further reasons that in the matter of the appeal by United Electronics Company (#82-1619):

consideration by the full court is necessary to secure or maintain uniformity of its decisions as to Fed. R. Civ. P.52; that determination of findings of fact are the function of the tribunal court; if the findings are inadequate or insufficient, the Appellate Court will remand for further findings. See United Shoe Machinery Corporation v. Kamborian et al, 160 F.2d 461 (1st Cir. 1947).

IN THE MATTER OF A.D.M. CORP., PLAINTIFF-APPELLANT, (#82-1618)

POINT I

FNB'S PUBLIC OFFER FOR SALE OF FROST CORP.'S SECURITIES ON OCTOBER 21, 1973 WAS A PRIMA FACIE VIOLATION OF SECTION 5(c)

In June 1973 U.E.Co. (Del) pledged its wholly owned Frost Corp. securities with FNB, a commercial lender. In October 1973 FNB, upon default, sought to foreclose upon the collateral held by it and on October 21, 1973, FNB publicly offered for sale the unregistered shares of plaintiff A.D.M. Corp. (Frost Corp.)

The 5th Circuit in Hill York Corporation v. American International Franchises, Inc succinctly stated the essential elements of the Section 5 violation as follows:

> "[1] In order to establish a prima facie case for a Section 5 violation, a plaintiff must prove three elements. First, it must be shown that no registration statement was in effect as to the securities. Second, it must be established that the defendant sold or offered to sell these securities, and finally, the use of interstate transportation or communication or of the mails in connection with the sale must be proved. See Lennerth v. Mendenhall, 234 F. Supp. 59 (N.D. Ohio 1964); III Loss, Securities Regulation 1693 (2d ed. 1961)."

POINT II

THE FACT THAT FNB WAS A BONA FIDE PLEDGEE DOES NOT RELIEVE IT FROM COMPLIANCE WITH REQUIREMENTS OF SECTION 5

The District Court found that in June 1973 FNB accepted in good faith the pledge of the Frost Corp. unregistered securities, which appellants do not dispute.

Appellants contend that the bona fide role of FNB as of June 1973, when it accepted the pledge, is not controlling nor is it an important

consideration determinative of the legality of its public offer to sell the pledged shares on October 21, 1973.

In the Guild Films Co.[1] the pledgee banks strongly urged their role as good faith pledgees as determinative of their rights to sell the pledged securities free of the registration requirements. The 2d Circuit Court succinctly disposed of this by stating at page 490:

> "[4] The banks have contended that they were "bona fide pledgees" and therefore "entitled upon default to sell the stock free of restrictions." They assume that "good faith" in accepting the stock is a sufficient defense. See Loss, Securities Regulation, 346 (1951). But the statute does not impose such a "good faith" criterion. The exemption in Section 4(1) was intended to permit private sales of unregistered securities to investors who are likely to have, or who are likely to obtain, such information as is ordinarily disclosed in registration statements. See S.E.C. v. Ralston Purina Co., 1953, 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494. The "good faith" of the banks is irrelevant to

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[1] SEC v. Guild Films Co., 279 F.2d 485, 489-90 (2d Cir.), cert. denied sub nom. Santa Monica Bank v. SEC, 364 U.S. 819 (1960).

> this purpose. It would be of little solace to purchasers of worthless stock to learn that the sellers had acted "in good faith". Regardless of good faith, the banks engaged in steps necessary to this public sale and cannot be exempted.

Also in the Guild Films Co at page 489 the Court noted that Congress had proposed originally a provision which would have given bona fide pledgees such rights, but said provision was not included in the Securities Act of 1933 as adopted.

POINT III

THERE EXISTS A STRONG PUBLIC POLICY TO PROHIBIT A PLEDGEE FROM OFFERING TO SELL PUBLICLY UNREGISTERED SHARES OF AN ISSUER, UNLESS THERE IS EITHER COMPLIANCE WITH SECTION 5 OR AN EXEMPTION FROM ITS DISCLOSURE REQUIREMENTS

Strength of the underlying public policy of the Securities Act related to public sale by bona fide pledgees has been challenged seriously by this Court. In this connection at page 7 of its decision, it concluded:

> "If there is a public policy against good faith pledgees offering collateral (consisting of unregistered shares) at a foreclosure sale to the public, it is not a strong one."

The Circuit Court recites a series of 13 No-Action letters by the S.E.C. to

selling pledgees as suggestive of a possibly 'sympathetic' or a possibly 'condoning public policy attitute' by the S.E.C. towards public sales by bona fide pledgees. The public policy of the S.E.C. is strong and very clear; at substantial administrative effort it established Rule 144, which permits a procedure for public sale of securities by pledgees under rigidly controlled conditions protective of the public interest and its need for adequate information. However, S.E.C. Rule 144 is not the exclusive means of public sale and the S.E.C. continues, now as before, to provide advisory services through its No-Action letters in appropriate instances not covered by Rule 144. The very existence of the need by selling pledgees for these 13 No-Action letters confirms public recognition by the securities industry at large of the need to assure itself against possible prosecution by the S.E.C. in support of its avowed positive public policy.

The No-Action letters are conditioned upon assurance that the proposed sales be made as private sales to either the selling pledgee or to financially sophisticated members of the public, either of whom would acquire same for investment use and not to be resold, except upon compliance with the provisions of the Securities Act of 1933 as amended.

Contrawise, the S.E.C. has affirmatively expressed its public policy by aggressive litigation seeking injunctive relief in Section 5(c) violations. In Guild Films Co. (supra) the bona fide

bank pledgees were enjoined from future public offer for sale of their pledged shares unless such sales be in compliance with the provisions of Section 5 of the Securities Act or exempted therefrom. To the same effect the S.E.C. vigorously prosecuted to injunction an offer for sale by an issuer in violation of Section 5(c) in S E C v. Truckee Showboat Inc.[2]

Enforcement efforts of the S.E.C. have been vigorous and of long standing; it is respectfully urged that unless this court affirms that a strong public policy does in fact exist to require strict compliance with Securities Act disclosure requirements by selling pledgees, the floodgates to distribution of unregistered securities would be opened and the public offer for sale by bona fide pledgees "would afford a ready method of thwarting the policy of the law and evading its provisions." See S E C v. Chinese Benevolent Association.[3]

POINT IV

ON OCTOBER 21,1973 FNB OFFERED TO SELL PUBLICLY THE UNREGISTERED FROST CORP. SECURITIES FOR U.E.CO. (DEL), ISSUER. BY THIS ACT FNB WAS AN UNDERWRITER WITHIN THE MEANING OF SECTION 2(11) OF THE SECURITIES ACT OF 1933

As to the definition of the term "underwriter" the District Court focuses

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2. 157 Fed Sup 824 (USDC (S.D.C.D. Cal- 1957)).

3. 2 Cir., 1941, 120 F.2d 738, certiorari denied, 1942, 314 U.S. 618, 62 S.Ct. 106, 86 L.Ed. 497.

its attention solely to that part of the definition of Section 2(11) which reads:

> "Section 2(11). The term "underwriter" means any person who has purchased from an issuer with a view to...the distribution of any security..." (Underscoring supplied.)

and this court has supported this narrow, restricted interpretation of Section 2(11).

Firstly, it must be noted that this portion of Section 2(11) is subjective and was intended to protect from the role of "underwriter" an innocent purchaser from an issuer; it was never the intent of Congress to penalize an innocent purchaser.

Secondly, this narrow interpretation of Section 2(11) is inapplicable to the facts at bar and in conflict with the District Court's own affirmative findings that the FNB was not a purchaser; the District Court found that FNB was merely a good faith pledgee who did not take "with a view to distribution".

The District Court should have applied the other portion of Section 2(11) which reads:

> "Section 2(11): The term "underwriter" means any person who...offers or sells for an issuer in connection with the distribution of any security..." (Underscoring supplied.)

This portion of the definition is unequivocal and clearly defines the role of FNB as an "underwriter". On October 21, 1973 FNB offered 'for sale' for the account of U.E.Co. (Del), issuer, in connection "with the distribution of...[the Frost Corp.] - securities". This portion of the definition is clear, unambiguous, and not subjective; it was intended to apply to just such an offerer as FNB under the circumstances.

Further, the scope of Section 2(11) of the Securities Act is better understood when one notes that the words "offers or "did not appear in the Securities Act of 1933 as originally enacted. Congress in its wisdom expanded the definition of underwriter to include one who "offers or" before the word "sells" by the enactment of Public Law 577, 83rd Congress.

The S.E.C. has expended great administrative efforts to develop the definition of "underwriter" and its has embodied the results of its extensive efforts in S.E.C. Rule 144. Unequivocally, the S.E.C. reiterates many times throughout the rule that the definitions above noted must be read disjunctively.

Prior to this amendment the S.E.C. could not act in enforcement of the public policy until after occurrence of illegal sales of securities; subsequent to the amendment the S.E.C. could avoid injuries to the public and enforce public policy by enjoining the preliminary illegal offers necessary to final sales.

POINT V

UNDER APPLICABLE NEW JERSEY LAW, FNB'S PURPORTED SALE TO ITSELF WAS INEFFECTIVE AND DID NOT SERVE TO TRANSFER TITLE TO FNB OF THE FROST CORP. SECURITIES

On October 21, 1973, FNB publicly offered for sale many items of collateral which included machinery, inventory, tangible property, and also the Frost Corp. unregistered securities. The validity of the offer for sale and subsequent sale of the machinery, inventory, equipment, and other tangible property is not challenged; the validity of the public offer for sale of the unregistered Frost Corp. securities is challenged as being in violation of Section 5(c).

On October 26, 1973, FNB conducted the proposed sale and at that time it presented a successful bulk bid for all items offered. There is no dispute that title to the machinery, inventory, equipment, and other tangible property passed to FNB at the making of its bulk bid. Appellants dispute the transfer of title to the Frost Corp. securities.

As to the Frost Corp. securities, FNB's act of offer for sale on October 21, 1973 was illegal, in violation of Section 5(c); having initiated the sale by its own illegal offer to sell the Courts of Equity of New Jersey would not allow FNB to take advantage of its illegal act, nor would they permit FNB to compound its prior illegal act by commission of a further illegal act,

namely, the purported sale to itself in violation of Section 5(a). See Whitney v. Lott.[4]

POINT VI

THE PURPORTED SALE ON OCTOBER 26, 1973 BY FNB TO ITSELF OF THE FROST CORP. SECURITIES WAS ILLEGAL, EXECUTORY, AND INCOMPLETE; IT DID NOT SERVE TO TRANSFER TITLE OF THE FROST CORP. SECURITIES TO FNB

SIMILARLY, THE S.E.C. IN GUILD FILMS CO. STRUCK DOWN BY INJUNCTION AND PREVENTED TRANSFER OF TITLE TO THE GUILD FILMS CO. SECURITIES PURSUANT TO THE OUTSTANDING, ILLEGAL EXECUTORY, INCOMPLETE SALES AGREEMENT

The Frost Corp. certificate by its own terms and by Massachusetts Law was transferable only on the books of Frost Corp., which at all times were in the possession of U.E.Co. (Del).

The evidence at trial established clearly that following the purported sale of October 26, 1973, FNB never sought nor did it obtain transfer of title to its name of the Frost Corp. securities.

The purported sale of October 26, 1973 continued as executory and incomplete from that date to June 1975, at which time it was annulled ab initio upon consent of all parties and the possession of Frost corp. securities which were returned to its rightful and

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[4] 134 N.J. Eq. 586, 36A 2d 888.

record owner, U.E.Co. (Del). The purported executory agreement of sale was annulled by the parties themselves in 1975, long before commencement of plaintiff's action.

From the evidence at trial it is clear that if FNB had sought to obtain transfer of title of the Frost Corp. securities to itself, this effort would have been opposed vigorously by U.E.Co. (Del) and transfer would have been refused.

The Securities Act and the courts have consistently supported innocent purchasers as to consensual contracts made with sellers acting in violation of Section 5.

Similarly, in Guild Films Co., in September 1959 the Santa Monica Bank sold 9,500 shares of Guild Films Co. securities and in September 24, 1959 sold 10,500 shares. Neither of the sales were completed by transfer of the stock; the S.E.C. commenced its action and obtained a permanent injunction against transfer whereupon the executory incomplete sales were by said injunction annulled.

There is nothing incongruous or inconsistent between the foregoing and the court's reference to A.C. Frost & Co. v. Coeur d'Alene Mines Corp.[5] The Securities Act of 1933 and the courts have consistently supported innocent purchasers of securities sold by sellers acting in violation of Section 5, holding that a violating seller cannot

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[5] 312 U.S. 38, 44 (1941).

seek avoidance of its own illegal sale as against an innocent purchaser. In the case at bar, FNB was not an innocent purchaser, but was in fact perpetrator of the illegal act. There was no arms' length nor consensual relationship between FNB, purchaser, and U.E.Co. (Del), seller; in fact, as stated above, as of the commencement of this action, there was no contract between the parties, executory or otherwise, that would require avoidance of same by the District Court.

POINT VII

AT TRIAL, BY UNDISPUTED EXHIBITS, U.E.CO. (DEL) ESTABLISHED A PRIMA FACIE CASE OF BREACH OF FIDUCIARY DUTIES OWED IT BY THOMSON; THE BURDEN TO SHOW FAIRNESS SHIFTED TO THOMSON, WHICH HE DID NOT ATTEMPT TO SUSTAIN

THE DISTRICT COURT FAILED OR OMITTED TO MAKE ANY FINDINGS OF FACT ESSENTIAL TO U.E.CO. (DEL)'S CLAIMS AS REQUIRED BY F.R. CIV. P. 52

THIS CIRCUIT COURT HAS FAILED TO REMAND TO THE DISTRICT COURT FOR ESSENTIAL AND SUBSTANTIAL FINDINGS

As of November 1973 plaintiff U.E.Co. (Del) commenced efforts to regain control of the Frost Corp. securities to itself.

As of October 26, 1973, Thomson began an entire course of action, secretive, concealed, hostile, and inimicable to the interests of his principal, U.E.Co. (Del), whereby he

sought to acquire Frost Corp.'s assets to himself; also, Thomson engaged in self dealing acts, took advantage of corporate opportunities, used and diverted corporate assets to his own selfish purposes and use.

The District Court's opinion fails to disclose any findings whatsoever as to any of the foregoing. This Court in compliance with Rule 52 was obliged to remand for essential findings, but failed to do so in breach of its obligations under Rule 52.[6]

DATED: Tuckahoe, New York
June 6, 1983.

ANGELO M. TORRISI

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6. See United Shoe Machinery Corporation v. Kamborian et al, 160 F.2d 461 (1st Cir. 1947); See 5A Moore's Federal Practice Paragraph 52.06[1],[2]; See State Comm'rs v. Jackson (1931) 283 US 527, 51 S Ct 540, 75 L ed 1248.

[COURT OF APPEALS - CAPTION]

ORDER OF COURT

Entered: June 17, 1983

Upon consideration of "Petition for Rehearing In Banc" by plaintiff appellants, A.D.M. Corp. and United Electronics Company, and by Third Party defendant appellee, General Electronics, Inc., which document was submitted to the members of the panel and to the judges of the Court who are in regular active service; and no judge who was a member of the panel nor any judge in regular active service having requested a vote on the suggestion for rehearing en banc,

It is ordered that the suggestion for rehearing en banc is hereby denied.

By the Court:

Francis P. Scigliano
Clerk

[DISTRICT COURT CAPTION - 76-4150Z]

MEMORANDUM OF DECISION

ZOBEL, D.J.

This is an action to set aside the sale of the assets of Frost Controls Corp. ("Frost Corp."), now named ADM Corp., to Frost Controls, Inc. ("Frost, Inc."). Plaintiffs also allege that Arthur J. Thomson, while an officer of Frost Corp., improperly took a management bonus and that he violated a fiduciary duty by keeping a corporate opportunity for himself. They seek recovery of the bonus and the proceeds derived from the transaction which gave rise to the claim of breach of fiduciary duty. Defendants have counterclaimed for damages under Mass.Gen.Laws Chapter 93A and for indemnification. They also assert third-party claims against Factors and Note Buyers, Inc. ("FNB"), the sole stockholder of Frost Corp. at the time of the sale of assets for breach of contract, against Alexander D. Matathias, the principal of FNB, and Marvin Schondorf, its counsel, for misrepresentation and negligence, against General Electronics, Inc. ("G.E. Inc."), the parent of plaintiff United Electronics Company for indemnification; and against Michael T. Gasparik, the guiding hand of plaintiffs; and G.E. Inc. for abuse of process and violation of Chapter 93A.

The following shall constitute my findings of fact and conclusions of law.

Michael T. Gasparik, an engineer and lawyer by training, has been since 1959 the president and treasurer and a director of G.E. Inc., a publicly traded conglomerate. He has held the same office in most of the wholly-owned subsidiaries of G.E. Inc., including United Electronics Company of Delaware ("U.E.Del.") and its sister company, United Electronics Company of New Jersey ("U.E. N.J.").

In February 1971, U.E. Del. acquired with a binder bid of $105,000, at a bankruptcy sale, the assets of four subsidiaries of Fairfield Technology Corporation. One of these subsidiaries, Frost Electronics, Inc., was then being run by defendant Thomson, and Gasparik asked him to continue to manage the business. Frost Electronics, Inc., located in Bellingham, Massachusetts, was engaged in the manufacture of photo-electric mechanisms and resistance-sensitive relays. In March 1971, Gasparik caused the assets of Frost Electronics, Inc. to be transferred to Frost Controls Corp., a new corporation organized under the laws of Massachusetts. The new corporation issued 5,000 shares to U.E. Del. Thomson was named president and Gasparik, treasurer. Thomson managed the company well and profitably and, at Gasparik's request, sent the latter weekly operational reports.

In June 1973, under the direction of Gasparik, U.E. N.J. borrowed $75,000 from FNE, having been unable to borrow from any bank. U.E. Del. guaranteed that obligation and, in support of the guaranty, pledged certain equipment and

all of the stock of Frost Corp. The parties executed a security agreement; FNB filed a UCC financing statement and paid to U.E. N.J. $75,000, plus $15,000 in connection with two other transactions only indirectly related to the loan. U.E. Del. endorsed in blank and delivered to FNB the certificate for Frost Corp. shares. Thomson was informed of neither the financial problems of Frost Corp.'s parent and grandparent, nor the pledge of the stock of the company of which he was president.

In August 1973, the Chase Manhattan Bank terminated an accounts receivable financing agreement with U.E. N.J. By October, the company had difficulty meeting its payroll, was unable to pay notes about tocome due, and owed $12,000 to $13,000 for withholding taxes, and $16,000 to a commercial creditor. When Matathias, the principal of FNB, informed Gasparik that U.E. N.J. was in default,* Gasparik told him that he (Matathias) "would have to do what he had to do" to realize on the collateral. A secured party sale was conducted on October 26, 1973 by A.J. Willner, an experienced auctioneer. Gasparik knew the sale was going to take place and knew that the stock of Frost Corp. would be sold. He assisted in the

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*The Security agreement between the parties provided: "The following shall constitute a default by Debtor: ... or any act of the Debtor which imperils the prospect of full performance or satisfaction of the Debtor's obligation herein."

preparations for the sale and attended the sale at the premises of U.E. Del., as did counsel for U.E. Del., Sanford Silverman. All of the collateral, including the Frost Corp. stock, was sold to FNB on a bulk bid of $55,000. Thomson learned of the sale initially from an employee of G.E. Inc. after it had taken place. I credit Thomson's testimony that in a conversation with Gasparik, on October 26, 1973, the latter told him that Frost Corp. was no longer the property of U.E. Del.; that it was owned by FNB.

From time to time, since the purchase of the assets of Frost Electronics, Inc. by U.E. Del., Thomson had tried to negotiate an equity position in the company. After the secured party sale and some initially desultory discussions with Matathias, FNB, as sole stockholder of Frost Corp., voted to sell the assets of Frost Corp. to Frost, Inc., a company organized by Thomson for this purpose. That sale was closed on October 21, 1974.

In early 1975, the Securities and Exchange Commission commenced an investigation into Gasparik's activities. One month later, Gasparik caused U.E. Del. to sue FNB in the New Jersey state court. That action was settled in May or June 1975 and FNB, as part of the settlement, returned to U.E. Del. the stock of Frost Corp., which had changed its name to ADM Corp. at the time of the sale of its assets. FNB also paid to U.E. Del. a sum in excess of $200,000 which allegedly represented the net proceeds of the sale of the assets by Frost Corp. U.E. Del. again

the sole stockholder of ADM Corp., joins with its subsidiary in bringing this lawsuit to recover the latter's assets which FNB had sold to Frost, Inc. or, as Gasparik described it in the May 1975 Form 8K, "the enrichment and excess asset values received..." by Thomson and Frost, Inc.

Plaintiffs claim that FNB did not acquire title to the stock of Frost Corp. at the secured party sale and could not, therefore, as sole stockholder, vote to sell the assets of that corporation. They assert, in support of their claim, first, that Gasparik and Matathias agreed at or after the sale that the Frost Corp. stock was not included in the sale; second, that the sale violated Section 5 of the Securities Act of 1933, 15 U.S.C. Section 77e; and, third that the sale was not commercially reasonable.

The first contention is easily disposed of. The only evidence of an alleged agreement between Gasparik and Matathias to exclude the stock from the sale is Gasparik's testimony, which I find totally incredible. I find that Gasparik knew that the stock would be and was included with other collateral for sale, and he knew that the stock had been sold to FNB. He told the Board of Directors of C.E. Inc., on October 30, 1973, that the stock had been sold. He signed and caused to be filed with the SEC a Form 8K, dated November 30, 1973, which stated that all of the stock had been sold to FNB. He ceased listing Frost Corp. as a subsidiary in

subsequent 8K filings.* Certain of the books and records of U.E. Del. showed that it no longer owned Frost Corp. Although Thomson, after the sale, stopped sending Gasparik the weekly financial reports, the latter never protested nor did he ever ask for them. He did not seek return of the stock certificate which had been turned over to FNB as collateral. In sum, the evidence is overwhelming that the stock was included in the sale, that Gasparik knew it, and that no agreement existed between Matathias and Gasparik to exclude the stock from the sale or to return it to U.E. Del.

Plaintiffs next contend that the sale violated Section 5 of the Securities Act, apparently because FNB offered for public sale "securities of an issuer as statutory underwriter without benefit of the exemption of Section 4(1) [and] without registration ...." (Plaintiff's post-trial brief, p.76) I find that the stock of Frost Corp. was not, in fact, registered. However, FNB was not an underwriter within the meaning of the Act. Section 2(11) defines an underwriter as including "any person who has purchased from an issuer with a view to...the distribution of any security...." Although the June 1973 pledge of stock may be construed to be a "purchase," SEC v. Guild Films Co., 178 F.Supp. 418 (S.D. N.Y. 1959), aff'd, 279 F.2d 485,

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*The May 1975 Form 8K again lists "ADM Corp. (formerly Frost Controls Corp.)" and explains the settlement of litigation with FNB.

cert. denied, 364 U.S. 819 (1960), and U.E. Del. was an "issuer," by virtue of its ownership of a controlling interest, FNB received the stock as a bona fide pledge and with the expectation of repayment of the loan. U.E. N.J. undoubtedly had financial problems in June 1973 when it borrowed from FNB, but there is no evidence to suggest that it did not, at that time, intend to redeem the stock or that FNB accepted the collateral with the expectation of selling it. On the contrary, the evidence of Gasparik's continued efforts, through July and into August, to borrow operating funds permits the inference, which I draw, that he intended all along that the loan from FNB be repaid. Accordingly, I find that FNB accepted the stock as a bona fide pledge and not "with a view ... to the distribution of [that] security...." Cf. SEC v. Guild Films Co., supra. FNB was not, therefore, an "underwriter" and the sale was exempt under Section 4(1) of the Act.

Plaintiff's third and last contention is that the sale was not commercially reasonable, as required by Section 9-504(3) of the Uniform Commercial Code, N.J. Stat. Section 12A:9-504(3). I find that this was a public sale which had been advertised in the Newark Star Ledger. The notice of sale included the date, time and place of sale, and it identified the collateral to be sold.*

*Plaintiffs argue that FNB had no detailed information as to several of the intangible assets listed, but it cites no authority for the proposition that such detail is required to be disclosed in the notice of sale.

The sale took place at the premises of the debtor and guarantor companies where all their books, tax returns, and financial statements were located. It was conducted by A.J. Willner, an auctioneer of sixty years' experience with whom Gasparik was well acquainted. The auctioneer at first offered the collateral in bulk and then, in an effort to obtain a better price, in lots. Gasparik, who was present at the sale, at no time before, during, or after the sale, objected to any of the procedures used.

Whether the sale was conducted in a commercially reasonable manner is a question of fact, see, e.g., Liberty National Bank & Trust Company of Oklahoma City v. Acme Tool Division of Rucker Company, 540 F.2d 1375, 1381-1382 (10th Cir. 1976), and the reasonableness of the sale is determined not solely by the price obtained but by the manner in which the sale is conducted. Mt. Vernon Dodge, Inc. v. Seattle-First National Bank, 18 Wash.App. 569, 570 P.2d 702 (1977); First National Bank & Trust Co. of Enid v. Holston, 559 P.2d 440, 444 (Okla. 1977); James Talcott, Inc. v. Reynolds, 165 Mont. 404, 529 P.2d 352, 354-355 (1974). Although subsequent events proved the price to be low, I find that the method, manner, time, place, and terms of the sale were commercially reasonable.

Plaintiffs have not challenged FNB's right to foreclose on the collateral pledged as security for FNB's loan. Because I find (1) that the stock of Frost Corp. was included in the sale; (2) that the sale of the stock did not

violate the Securities Act of 1933; and (3) that the sale was commercially reasonable, title to the stock passed to FNB upon acceptance of its bulk bid, which was the highest bid. FNB, as sole stockholder, had every right thereafter to authorize the corporation to sell its assets.

Plaintiffs assert against Thomson a claim that he, while an officer of Frost Corp., failed to disclose to FNB and wrongfully appropriated to himself, a corporate opportunity which belonged to Frost Corp. At a closing on October 21, 1974, Frost Corp. consummated the sale of all of its assets to Frost, Inc., a Rhode Island Corporation formed by Thomson for this purpose. On February 3, 1975, Frost, Inc. sold to Sigma Industries, Inc. ("Sigma") certain of its assets and Thomson entered into a consulting agreement with Sigma. The transactions with Sigma constitute the alleged corporate opportunity which plaintiffs contend belongs to ADM, formerly Frost Corp.

A person in a fiduciary relationship to a corporation may not take advantage of an opportunity for personal gain in derogation of the interests of the corporation, and its shareholders. Durfee v. Durfee & Canning Company, 323 Mass. 187, 196, 80 N.E.2d 522, 527 (1948). That doctrine is based on standards of equity and fairness, and its application depends upon the particular facts of each case. Id., 323 Mass. at 199, 80 N.E.2d at 527. In this case, resolution of plaintiffs' charges requires a determination of the nature of the relationship between Thomson on

one hand and Frost Corp. and FNB, its sole stockholder, on the other. The next question is whether, under all the circumstances, Thomson's failure to disclose the approach by Sigma was unfair and inequitable.

I find that FNB was in the business of lending and financing. Neither Matathias, its principal, nor anyone on his behalf took any interest at any time in the operation of Frost Corp. Matathias' object, after the secured party sale, was to liquidate all of the collateral FNB had purchased. Indeed, between October 26, 1973, the date of the acquisition of the stock by FNB, and October 21, 1974, the date of the sale of the assets of Frost Corp., Matathias' conversations with Thomson related almost exclusive to the sale of the corporation or its assets by FNB.

The parties met on November 20, 1973, and Thomson informed Matathias of his interest in purchasing the company. Matathias told him to continue to operate the company and that Matathias would let him know of FNB's intentions when a decision had been made.

In May 1974, Matathias requested a review of the books of the company by his accountant. Although permission was ultimately given, the accountant never appeared.

On August 8, 1974, Matathias and FNB's counsel, Marvin Schondorf, met with Thomson and his personal counsel, Ralph P. Semonoff, at the office of Frost Corp. in Bellingham, Massachusetts. They toured the plant to get an

idea of value and then met at a restaurant where Matathias first conducted a stockholder meeting. He named himself and one Melvin S. Goldberg as directors. Schondorf was named secretary-treasurer, and Thomson declined the invitation to be elected president.* Matathias and Thomson then discussed the sale of the assets by Frost Corp. and Matathias told Thomson if the latter was not interested or they could not agree on a price Matathias would liquidate the assets by auctioning them. In fact, the parties did at that meeting agree that Frost Corp. would sell the assets to Thomson at a price of $220,000 cash, and that Thomson would assume liabilities in the amount of approximately $18,000. Thereafter counsel prepared the requisite documentation, and the formal closing took place on October 21, 1974. As a result of earlier inquiries, Thomson did have, at the time of the August meeting, a commitment letter from the Old Stone Bank, Providence, Rhode Island, for such financing as he would need to complete the purchase.

Plaintiff ceased being a director of Frost Corp. on August 8, 1974. On that day also, Matathias and Thomson had reached a meeting of the minds concerning the sale of the assets. Matathias considered it an excellent deal. Although Thomson continued to manage the business nominally for Frost Corp. until the closing, Matathias, a

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*I credit Thomson's testimony in this regard although he is shown as president in the Seller's Certificate.

man experienced in corporate matters and finance, knew that Thomson was, during the interregnum, acting on his own behalf and he no longer regarded Thomson as having any fiduciary duty to Frost Corp. or FNB. I find that Thomson, in fact, owed no fiduciary duty to Frost Corp. or FNB after August 8, 1974 and that he, therefore, had no obligation to disclose to FNB or Matathias the meetings with officers of Sigma in September and early October, and their inquiries concerning a purchase of some of the assets, even it those initial inquiries were to be deemed a corporate opportunity.*

Plaintiffs' last claim, for recovery of a bonus paid to Thomson in March 1974, is barred by the release given by Frost Corp. at the October 21, 1974 closing. The evidence is undisputed and I find that Matathias knew, as of the August meeting, that Thomson had taken a bonus. It is also undisputed and I find that Matathias, who was duly authorized, did, on behalf of Frost Corp., release Thomson "from any and all claims, demands, actions and causes of action of every kind and nature which Frost now has or might have against Thomson and especially from any claims arising out of compensation, including bonuses, received from Frost by Thomson." Plaintiffs suggest no reason or authority why this explicit release does not determine the issue of the bonus.

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*No agreements were reached with Sigma until several weeks after the closing of the sale by FNB. The sale to Sigma was not closed until February 1975.

Since there was full disclosure and since Matsthias was properly authorized to execute the release, plaintiffs are bound thereby. That claim for recovery of the bonus paid to Thomson is accordingly denied.

Defendants have counterclaimed for damages (1) for alleged violations of Mass.Gen.Laws ch. 93A; (2) for abuse of process; (3) for indemnity, and (4) for breach of contract. They also claim against Gasparik for violations of ch. 93A and abuse of process. The third and fourth claims are based on the agreement of sale between Frost Corp. and Frost, Inc. The 93A and abuse of process claims are premised on the assertion that Gasparik instituted this lawsuit solely to buttress his defense to an investigation into his activities by the SEC.

Section 11 of the Massachusetts Consumer Protection Act, Mass.Gen.Laws ch. 93A, provides that "[a]ny person who engages in the conduct of any trade or commerce and who suffers any loss...as a result of the use...by another person who engages in any trade or commerce of...an unfair or deceptive act or practice..." may recover damages. Defendants assert that bringing a frivolous lawsuit is such an unfair act or practice.

Apart from the fact that this section of the statute addresses unfair practices in the conduct of commerce and not any isolated transaction unrelated to the business of the parties, see Lantner v. Carson, 374 Mass. 606, 373 N.E.2d 973 (1978), defendants have not

established the commission by plaintiffs of an unfair act within the meaning of the statute. The cases on which defendants rely are inapposite. They found violations of ch. 93A or Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45*, where the respondents made repeated threats of litigation for unlawful ends, In re Western Confectioners Ass'n, 34 F.T.C. 1431 (1942), where respondent repeatedly brought groundless taxpayer suits against purchasers from its competitors, In re Automatic Voting Machine Corp., 47 F.T.C. 1068 (1951), or where lenders engaged in a practice of filing lawsuits against their debtors in inconvenient forums, Spiegel, Inc. v. F.T.C., 540 F.2d 287 (7th Cir. 1976); Schubach v. Household Finance Corp., 375 Mass. 133, 376 N.E.2d 140 (1978). Even if plaintiffs' action were wholly groundless, which I do not find, and even if it had been brought in response to the SEC investigation of Gasparik, which was probably one of the motivating factors, the filing and prosecution of this lawsuit do not violate ch. 93A. This is but a single lawsuit, not part of a pattern, and it is unrelated to defendants' ordinary business or trade of manufacturing electrical relays.

Defendants' claim for abuse of process also fails. To sustain a cause

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*Section 2(b) of ch. 93A expresses the intent of the legislature that, in interpreting the Massachusetts statute, courts be guided by interpretations given to Section 5(a)(1) of the Federal Trade Commission Act.

of action for abuse of process, plaintiff must show "that the process was used to accomplish some ulterior purpose for which it was not designed or intended, or which was not the legitimate purpose of the particular process employed." Gabriel v Borowy, 324 Mass. 231, 236, 85 N.E.2d 435, 439 (1949); Quaranto v. Silverman, 345 Mass. 423, 426, 187 N.E.2d 859, 861 (1963); Jones v Brockton Public Markets, Inc., 369 Mass. 387, 340 N.E.2d 484, 485 (1975). Although plaintiffs used the process of this court to institute the action, they used it for the purpose for which it is intended--to litigate the rights of the parties to the assets of Frost Corp. That plaintiffs may also have been encouraged to litigate because of the SEC investigation of Gasparik does not render improper the use of process to determine rights in dispute.

Defendants' claims for indemnity against plaintiffs requires consideration of several of the closing documents executed in connection with the sale of assets on October 21, 1974. Frost Corp. (now plaintiff ADM Corp.,) agreed in a Purchase Agreement to sell all of its assets as of the close of business that day to Frost, Inc. It also certified that all of its stock was then owned by FNB and that FNB, as sole stockholder, had voted to sell the assets. It further executed and delivered a Bill of Sale and Assignment transferring the assets to Frost, Inc. The Purchase Agreement provides that each of the parties thereto agrees to indemnify the other for any claims, damages or expenses, including reasonable attorneys' fees, sustained by the

indemnified party, resulting from "any false or misleading representation or warranty made by the indemnifying party ..." "or arising out of or by virtue of any noncompliance with or breach of any of the agreements contained herein to be performed by the Indemnifying Party..."

Defendants assert that ADM Corp., by commencing this action, has breached the agreement and warranties contained therein and that defendants are, therefore, entitled to indemnity. The language of the indemnification clause cannot be stretched so far. There is no question that Frost Corp. did carry out its obligations under the agreement and that it lived up to the warranties given. I so found in the first part of this memorandum. The later unsuccessful assertion by the corporation that the sole stockholder at the time of sale was an imposter cannot detract from the fact that it had fully complied with the agreement. The counterclaims for indemnity are denied.

Because the action is not "wholly" insubstantial or frivolous, defendants' claim for attorneys' fees, pursuant to Mass.Gen.Laws ch. 231 Section 6F, is denied.

Thomson also claims indemnification for his expenses against U.E. Del. and C.E. Inc. That claim is grounded on the by-laws of those corporations which provide for indemnification of officers and directors. Since Thomson was not sued "by reason of being or having been" an officer or director, but rather for actions allegedly inimical to the corporation, indemnification is not available.

Since defendants prevail with respect to plaintiffs' claims concerning the sale of assets, the cross-claims against FNB, Matathias, and Schondorf are moot.

Judgment may be entered for defendants on the complaint and for plaintiffs on the counterclaim. Judgment may also be entered for G.E. Inc. on the cross-claim by Thomson and for Gasparik on the cross-claim by Thomson and Frost, Inc. Defendants' cross-claims against FNB, Matathias and Schondorf may be dismissed as moot.

July 6, 1982 — DATE

Rya W. Zobel — DISTRICT JUDGE

[DISTRICT COURT - CAPTION 76-4150Z]

FINAL JUDGMENT

ZOBEL, D.J.

In accordance with the Memorandum of Decision dated July 6, 1982, it is ORDERED that judgment is hereby entered for the defendants on the complaint, and for the plaintiffs on the counterclaim. Judgment is entered for General Electronics, Inc. on the Cross-claim by Arthur J. Thomson, and for Michael T. Gasparik on the cross-claims by Arthur J. Thomson and Frost, Inc. Defendants' cross-claims against Factors and Note Buyers, Inc., Alexander D. Matathias, and Marvin Schondorf are hereby dismissed.

By the Court,

Nina Singer

Deputy Clerk

Date: July 7, 1982

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NO. 76-4150

A.D.M. CORP. and UNITED ELECTRONICS COMPANY, Plaintiffs,	)
vs.	) COMPLAINT
ARTHUR J. THOMSON and FROST CONTROLS, INC., Defendants.	)

Plaintiffs, complaining of Defendants, allege the following Causes of Action.

FIRST CAUSE OF ACTION

1. Jurisdiction is conferred on this Court by the diversity of citizenship between the parties, and an amount in controversy exceeding Ten Thousand ($10,000) Dollars exclusive of interest and costs, U.S.C. Title 28, Section 1332. Jurisdiction exists within the District of Massachusetts by virtue of the provisions of the Massachusetts Long Arm Statute, Massachusetts General Laws Chapter 223A, Section 3, as amended; more particularly Massachusetts General Laws Chapter 223A, Section 3 subsections (a), (b), (c), (d). Jurisdiction is also present with authority for process to issue outside of the district by virtue of the provisions of the Federal Rules of Civil Procedure, Rule 4(d)(7).

2. Plaintiff, A.D.M. CORP., is a

corporation organized and existing under the laws of the Commonwealth of Massachusetts, a citizen and resident thereof, having its principal place of business in the City of Fall River, Commonwealth of Massachusetts.

3. Plaintiff, UNITED ELECTRONICS COMPANY, is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the City of Newark, New Jersey.

4. Defendant, ARTHUR J. THOMSON, is a citizen and resident of the State of Rhode Island.

5. Defendant, FROST CONTROLS, INC., is a corporation organized and existing under the laws of the State of Rhode Island, a citizen and resident thereof, having its principal place of business at One Angell Road, Cumberland, in the State of Rhode Island.

6. From the date of its incorporation, March 3, 1971, until October 21, 1974, Plaintiff A.D.M. CORP. maintained its principal place of business at 26 Pearl Street, Bellingham, Massachusetts 02024 where it had its office, manufacturing plant, equipment, inventory, and other personal property, all subject matter of the acts of conversion, transfer, sale or disposition on October 21, 1974 by or to the Defendants as hereinafter alleged.

7. From inception until October 21, 1974, Plaintiff was known as Frost Controls Corp. at which time Defendants caused its name to be changed to A.D.M. CORP.

8. From the date of incorporation through to the close of the business day on October 21, 1974, Defendant, ARTHUR J. THOMSON, was the President, chief executive and operating officer of Plaintiff A.D.M. CORP., and a member of its Board of Directors.

9. On March 15, 1971, Plaintiff A.D.M CORP. (at that time Frost Controls Corp.) authorized issuance of Certificate #1 for 5,000 shares of its common stock to Plaintiff UNITED ELECTRONICS CO., representing all of Frost Controls (today "A.D.M.") Corp.'s issued and outstanding stock. This certificate remains in full force and effect, and since said date UNITED ELECTRONICS CO., as reflected upon the books and records of Plaintiff A.D.M. CORP., has remained continuously as sole registered stockholder of Plaintiff A.D.M. CORP.

10. On or about June 14, 1973, United Electronics Co. (NJ) borrowed $75,000 from Factors and Note Buyers Inc. which it secured by a security agreement covering all of its production machinery, equipment, and inventory, and also the accomodation guarantee of its sister corporation, Plaintiff United Electronics Co. (Del), and delivery in pledge of Certificate #1 of Frost Controls Corp. for 5,000 shares common stock as then owned by Plaintiff United Electronics Co. (Del), said shares being all of the outstanding shares of Frost Controls Corp.

11. Factors and Note Buyers Inc. subsequently declared the loan of United Electronics Co. (NJ) to be in default

and as secured party caused a sale to be conducted on October 26, 1973 at which sale Factors and Note Buyers Inc. was the successful bidder. At this sale, Factors and Note Buyers Inc. purported to buy all the machinery, equipment, and inventory of United Electronics Co. (NJ) and the 5,000 shares of stock of Frost Controls Corp.; Factors and Note Buyers Inc. thereafter did not cause to be transferred to itself the said 5,000 shares of the common stock of Plaintiff A.D.M. CORP. (Frost Controls Corp.) on the books and records of Plaintiff A.D.M. CORP. (Frost Controls Corp.)

12. The sale and all acts thereunder were challenged and were disputed by the Plaintiff UNITED ELECTRONICS CO. and the Plaintiff A.D.M. CORP. as to legality, right, and propriety, with notice of challenge and dispute to Defendant ARTHUR J. THOMSON. The illegality and the impropriety of the sale and the acts complained of were well known at all times to the Defendant ARTHUR J. THOMSON.

13. Plaintiffs are informed and believe that Factors and Note Buyers Inc. did conspire together with Defendant ARTHUR J. THOMSON and Defendant FROST CONTROLS, INC. in a plan to defraud, despoil and deprive Plaintiffs of their assets and to divide same between Factors and Note Buyers Inc. and Defendant FROST CONTROLS, INC.

14. This plan involved the following actions by the Defendants.

a. The Defendant ARTHUR J. THOMSON did cause the Defendant FROST CONTROLS,

INC., to be organized as a corporation under the laws of Rhode Island on October 9, 1974, for the purpose of establishing a vehicle to purchase and acquire the assets of Frost Controls Corp., the plaintiff now known as A.D.M. CORP., by collusive action with Factors and Note Buyers Inc. Plaintiffs believe that this corporation is substantially owned and controlled by the Defendant ARTHUR J. THOMSON, who was elected its President, Treasurer and sole Director.

b. The Defendant THOMSON, acting simultaneously as both the principal executive officer of Frost Controls Corp. (the predecessor name of the Plaintiff A.D.M. CORP.) and as principal executive officer of the newly formed corporation FROST CONTROLS, INC., did in breach of his fiduciary duty to Frost Controls Corp., purport to act for and on behalf of both corporations in a variety of conflicting matters. These matters involved the purported sale in October, 1974, and distribution of all assets and good will including the name of "Frost Controls" to FROST CONTROLS, INC., the corporation principally owned and operated by the Defendant THOMSON. Defendant FROST CONTROLS, INC. thereby acquired not only the physical assets of Frost Controls Corp., but also all of its good will, contractual rights, corporate opportunities and other property. These acts by Defendant THOMSON were to his personal advantage and constituted wrongful and willful breaches of his fiduciary obligations to both A.D.M. CORP. and UNITED ELECTRONICS COMPANY, Plaintiffs.

c. The plan of division and despoliation provided in essence that Factors and Note Buyers Inc. would

receive in cash a sum equal in substance to the cash balances then existing in Plaintiff A.D.M.'s bank accounts plus the value of its accounts receivable and other liquid assets. Defendant FROST CONTROLS, INC. would receive all of the good will, a release of Plaintiff's name --FROST CONTROLS--, all the intangibles, all of the inventory, machinery, plant, tooling and equipment, work in process, and all of the cash in bank, accounts receivable, which it would use to raise the moneys to be paid to Factors and Note Buyers Inc.

d. The instrument of fraud as devised and contrived by Defendants and by Factors and Note Buyers Inc. was in the form of a sham and fraudulent contract of sale which nominally transferred all of the assets of Plaintiff A.D.M. CORP. to Defendant FROST CONTROLS, INC., and nominally provided for payment to Plaintiff A.D.M. CORP. of a stated cash consideration of $220,000.

e. On or about October 21, 1974 at a closing, Defendant FROST CONTROLS, INC. did issue a check payable to Plaintiff --then named Frost Controls Corp.-- for $218,884. The foregoing sum was raised from Plaintiff A.D.M.'s own assets directly or indirectly, by means devised and contrived by Defendants. Concurrently Defendant FROST CONTROLS, INC. received a transfer of all Plaintiff's assets.

f. Plaintiffs believe that immediately following the closing Factors and Note Buyers Inc. reduced to its own possession the $218,884 nominally received in the name of Plaintiff A.D.M. CORP.

g. At or concurrent with the closing, Defendant ARTHUR J. THOMSON as

President fraudulently and in furtherance of the plan of division and despoliation executed an Article of Amendment to change the name of Plaintiff from Frost Controls Corp. to A.D.M. CORP., which change of name Defendant ARTHUR J. THOMSON did thereupon cause to be filed in the office of the Secretary of the Commonwealth of Massachusetts.

15. Following completion of all of the acts necessary and essential to the plan of despoilment and division of the assets of Plaintiff A.D.M. CORP., Defendant ARTHUR J. THOMSON resigned as President and Director of Plaintiff A.D.M. CORP., effective as of the close of business, October 21, 1974.

16. Subsequent to the aforesaid closing, Plaintiff UNITED ELECTRONICS COMPANY instituted litigation in the Courts of the State of New Jersey against Factors and Note Buyers Inc. challenging the legality and propriety of the Secured Party Sale of October 26, 1973 and all acts thereunder. Factors and Note Buyers Inc. pursuant to judgment entered therein, among other relief, surrendered to UNITED ELECTRONICS CO. the Certificate #1 for 5,000 shares of the common stock of Plaintiff and paid to Plaintiff, A.D.M. CORP., the sum of $206,211.05.

17. By reason of the foregoing, Plaintiff A.D.M. CORP. was deprived of all of tis assets having a fair market and reasonable value of at least $750,000.

18. The defrauding of Plaintiffs and

the taking from A.D.M. CORP. all of its goods, wares, and assets was willful, intentional, and malicious with gross disregard of Plaintiffs' rights and well being. Plaintiffs are entitled to recover from Defendant FROST CONTROLS, INC. $750,000 as damages for the willful, wrongful and illegal acts on the part of Defendant FROST CONTROLS, INC. hereinabove referred to.

SECOND CAUSE OF ACTION

19. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 18 of this Complaint as if the same were more fully set forth herein at length, and incorporate the same in this Second Cause of Action.

20. The actions of Defendant ARTHUR J. THOMSON were in breach of the fiduciary duty which he owed to Frost Controls Corp. (the Plaintiff A.D.M. CORP.) as the president of that corporation. In conspiracy with Factors and Note Buyers Inc., he and Defendant FROST CONTROLS, INC. acted to his own personal advantage in flagrant abuse of his corporate position and amounted to fraud for which Plaintiffs seek recovery.

21. By reason of the foregoing, Plaintiff A.D.M. CORP. was deprived of all its assets having a fair market and reasonable value of at least $750,000.

22. The defrauding of Plaintiffs and the taking from A.D.M. CORP. all of its goods, wares, and assets was willful, intentional, and malicious with gross disregard of Plaintiffs' rights and well

being. Plaintiffs are entitled to recover from Defendant FROST CONTROLS, INC. $750,000 as damages for the willful, wrongful and illegal acts on the part of Defendant FROST CONTROLS, INC. hereinabove referred to.

THIRD CAUSE OF ACTION

23. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 18 of this Complaint as if the same were more fully set forth herein at length, and incorporate the same in this Third Cause of Action.

24. Plaintiffs say that the actions of the Defendant FROST CONTROLS, INC. constituted unfair methods of competition and unfair and deceptive trade practices, such conduct being a violation of Massachusetts General Laws, Chapter 93A, section 2, as amended.

25. As a direct result of Defendant FROST CONTROLS, INC.'s actions herein complained of, the Plaintiffs have sustained great harm as evidenced by the loss of both money and property, both tangible and intangible, in the form of lost business, damaged good will, misappropriated property consisting of valuable product designs, trade secrets, tools, equipment, and other items of great worth which belonged to Frost Controls Corp.

26. Such conduct on the part of Defendant FROST CONTROLS, INC. was both willful and knowing on its part. The Plaintiffs pray that this Honorable Court award the Plaintiffs three times

the amount of damages which they sustained, together with reasonable attorneys' fees, costs and interest, to be assessed against the Defendant FROST CONTROLS, INC.

FOURTH CAUSE OF ACTION

27. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 18 of this Complaint as if the same were more fully set forth herein at length, and incorporate the same in this Fourth Cause of Action.

28. Plaintiffs say that the actions of the Defendant ARTHUR J. THOMSON constitute unfair methods of competition and unfair and deceptive trade practices, such conduct being a violation of Massachusetts General Laws, Chapter 93A, section 2, as amended.

29. As a direct result of Defendant ARTHUR J. THOMSON's actions herein complained of, the Plaintiffs have sustained great harm as evidenced by the loss of both money and property, both tangible and intangible, in the form of lost business, damaged good will, misappropriated property consisting of valuable product designs, trade secrets, tools, equipment, and other items of great worth which belonged to Frost Controls Corp.

30. Such conduct on the part of Defendant ARTHUR J. THOMSON was both willful and knowing on his part. The Plaintiffs pray that this Honorable Court award the Plaintiffs three times the amount of damages which they sustained,

together with reasonable attorneys' fees, cost and interest to be assessed against the Defendant ARTHUR J. THOMSON.

FIFTH CAUSE OF ACTION

31. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 18 of this Complaint as if the same were more fully set forth herein at length, and incorporate the same in this Fifth Cause of Action.

32. At some time during late 1973 or early 1974, Defendant ARTHUR J. THOMSON wrongfully took from Plaintiff A.D.M. CORP., and converted to his own use and benefit, the sum of Thirty-two Thousand Two Hundred Eighty-five ($32,285) Dollars which Defendant THOMSON caused to be identified improperly on the books and records of Plaintiff A.D.M. CORP. as a "management bonus". Said taking of $32,285 by Defendant THOMSON was without the knowledge of the Board of Directors of Plaintiff A.D.M. CORP., the matter of the alleged "management bonus" having been neither acted upon nor authorized by Plaintiff's Board of Directors.

33. The taking by Defendant THOMSON of the $32,285 from Plaintiff A.D.M. CORP. was without Plaintiff's knowledge and consent, wrongful, willful, intentional and malicious with gross disregard to Plaintiff's rights and well being. Plaintiff A.D.M. CORP. is entitled to recover $32,285 from Defendant ARTHUR J. THOMSON as damages for the willful and malicious acts on the part of said Defendant.

WHEREFORE PLAINTIFFS PRAY that this Honorable Court adjudge, declare and decree that

1. The Defendant FROST CONTROLS, INC. be held liable to the Plaintiffs for damages sustained because of the Defendant's actions complained of in the First Cause of Action in the amount of $750,000 together with interest and costs.

2. The Defendant ARTHUR J. THOMSON be held liable to the Plaintiffs for damages sustained because of the Defendant's actions complained of in the Second Cause of Action in the amount of $750,000 together with interest and costs.

3. The Defendant FROST CONTROLS, INC. be held liable to the Plaintiffs for treble damages because of the Defendant's actions complained of in the Third Cause of Action in the amount of $2,250,000, together with reasonable attorneys' fees, interest and costs.

4. The Defendant ARTHUR J. THOMSON be held liable to the Plaintiffs for treble damages because of the Defendant's actions complained of in the Fourth Cause of Action in the amount of $2,250,000, together with reasonable attorneys' fees, interest and costs.

5. The Defendant ARTHUR J. THOMSON be held liable to the Plaintiffs for damages because of the Defendant's actions complained of in the Fifth Cause of Action in the amount of $32,285 together with interest and costs.

6. The Plaintiffs be awarded such further relief as this Honorable Court may deem proper and necessary.

A D.M. CORP.

By Michael T. Gasparik, PRES.

UNITED ELECTRONICS COMPANY

By Michael T. Gasparik, PRES.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, SS. Boston, Massachusetts
November 19, 1976

Then personally appeared MICHAEL T. GASPARIK who made oath that the foregoing statements are true or are made on information and belief and therefore believed to be true.

Before me,

Margareth M. Heylin
Notary Public

My Commission Expires:
4/21/83

EPSTEIN, SALLOWAY & KAPLAN

By/_____

Stanley M. Epstein
101 State Street
Boston, Massachusetts
02109
(617) 742-5400

[DISTRICT COURT - CAPTION 76-41501]

PLAINTIFF'S AMENDED COMPLAINT
BY ADDITION OF SIXTH CAUSE OF ACTION

SIXTH CAUSE OF ACTION

34. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 16 of this Complaint as if the same were fully set forth at length and incorporate the same in the Sixth Cause of Action.

35. Upon information and belief that in the early part of September 1974 defendant Thomson, as President of Plaintiff (Frost Controls Corp.), was solicited by Sigma Instruments, Inc. as to the possible purchase of a portion of Plaintiff's (Frost Controls Corp.) relay business, namely, its general purpose relay switching device business, the manufacturing and trade secrets, the jigs, dies, tools and fixtures related thereto.

36. That defendant Thomson informed Sigma Instruments, Inc. that the assets whose purchase was then solicited by Sigma Instruments, Inc. were then and there owned by Plaintiff (Frost Controls Corp.).

37. That defendant Thomson further advised that he, Thomson, was negotiating to acquire the assets solicited by Sigma Instruments, Inc.

38. That defendant Thomson further advised and informed Sigma Instruments, Inc., that, when and as if, the proposed purchase were to be effected that he,

Thomson, would be willing to sell to Sigma Instruments, Inc. all of the relay portion of Plaintiff's (Frost Controls Corp.) relay business and not merely the general purpose relay as sought and solicited by Sigma Instruments, Inc. retaining for himself the photo-electric device and motion control business associated therewith.

39. That Thomson, as President and director of Plaintiff (Frost Controls Corp.), did not inform the Board of Directors of Plaintiff (Frost Controls Corp.) of the offer and solicitation as made by Sigma Instruments, Inc.

40. That the failure of Thomson to inform the Board of Directors of Plaintiff (Frost Controls Corp.) of the offer and solicitation as made by Sigma Instruments, Inc. was deliberate and intentional and in breach of his fiduciary duties to Plaintiff (Frost Controls Corp.) and such breach of duties was motivated by the desire and intention of defendant Thomson to retain unto himself the fruits and benefits of such corporate opportunities as might be available in connection with the proposed solicitation and purchase by Sigma Instruments, Inc.

41. During the early part of September 1974 and on September 27, 1974, Thomson offered to sell to Sigma Instruments, Inc. the relay portion of Plaintiff's (Frost Controls Corp.) business for the sum of $300,000 and Sigma Instruments, Inc. agreed in principle to acquire same.

42. That as between Plaintiff (Frost

Controls Corp.) as seller and defendant Frost Controls, Inc. as buyer, the buy/sell agreement of October 21, 1974 was simultaneously signed, executed and closed on said date.

43. That the buy/sell agreement of October 21, 1974 was void and ineffective and did not, nor could it, serve to transfer title to the assets of Plaintiff (Frost Controls Corp.) to defendant Frost Controls, Inc., the parties allegedly acting for and on behalf of Plaintiff (Frost Controls Corp.) lacking all authority to act for Plaintiff (Frost Controls Corp.)

44. That, although Plaintiff (Frost Controls Corp.) does not concede it, in the event the buy/sell agreement of October 21, 1974 did serve to transfer to defendant Frost Controls, Inc. the title of Plaintiff (Frost Controls Corp.) to its assets, then and in such event, the said sale was voidable by reason of Thomson's breach of fiduciary duties as herein and hereinbefore alleged.

45. Following closing of the buy/sell agreement of October 21, 1974 the Board of Directors of Sigma Instruments, Inc. on November 15, 1974 approved the contemplated acquisition and purchase by Sigma Instruments, Inc. of the relay portion of Plaintiff's business.

46. By written agreement dated December 26, 1974, Frost Controls, Inc., as seller, agreed to sell and Sigma Instruments, Inc., as buyer, agreed to purchase all of the properties and assets of Plaintiff's (Frost Controls

Corp.) relay business for the sum of $290,000 and concurrently Sigma Instruments, Inc. agreed to execute a separate consultant's agreement with Arthur J. Thomson for an additional $10,000 for a five month period to follow closing.

47. On February 3, 1975 at a closing held at 40 Westminster Street, in Providence, Rhode Island, Frost Controls, Inc. purported to sell and Sigma Instruments, Inc. purported to purchase the relay portion of Plaintiff's (Frost Controls Corp.) business and assets which had been acquired by Frost Controls, Inc. on October 21, 1974 as hereinbefore alleged.

48. On February 3, 1975, the Old Stone Bank as agent for Frost Controls, Inc. received that portion of the consideration then paid by Sigma Instruments, Inc., namely $260,000, which it immediately applied to pre-payment in full of the then remaining unpaid principal of $122,250 on the five-year term loan made by Old Stone Bank to defendant Frost Controls, Inc. on October 21, 1974 and concurrently Old Stone Bank released and discharged the security lien which it then held on Plaintiff's machinery, equipment, inventory, furniture, fixtures and accounts receivable.

WHEREFORE, Plaintiffs pray:

1. That defendant Thomson be ordered to give an accounting to the Plaintiffs of all gains, profits and advantages derived by defendant Thomson in the

operation of Frost Controls, Inc. and in the utilization of any of the assets or corporate opportunities of Frost Controls Corp. (now A.D.M. CORP.).

2. That defendant Thomson be ordered to pay to the Plaintiffs such damages as the Plaintiffs have sustained by reason of the wrongful acts of defendant Thomson complained of above including costs and attorneys' fees.

3. For such other and further relief as this Honorable Court may deem necessary and appropriate.

Plaintiffs,

A.D.M. CORP.

By_____
Michael T. Gasparik
President

UNITED ELECTRONICS COMPANY

By_____
Michael T. Gasparik
President

37 Fed. Reg. 591, (January 14, 1972), 17 CFR 230.144.

(Release No. 33-5223)

PART 230-GENERAL RULES AND REGULATIONS SECURITIES ACT OF 1933

PART 239-FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

Definition of Terms "Underwriter" and "Brokers' Transactions"

The Securities and Exchange Commission today announced the adoption of Rule 144 (17 CFR 230.144) under the Securities Act of 1933 (the Act). The new rule relates to the application of the registration provisions of the Act to the resale of securities acquired directly or indirectly from issuers or from affiliates of such issuers in transactions not involving any public offerings (restricted securities) and securities held by affiliates. The rule is designed to implement the purposes and policies underlying the Act and is based on the Commission's further reexamination of its interpretations in this area and on the comments received on previous proposals, the "160 Series" rules (Securities Act Release No. 4997; 34 F.R. 14228) and Rule 144 (Securities Act Releases Nos. 5087 and 5186; 35 F.R. 15447 and 36 F.R. 18585). This notice contains a general discussion of the background, purpose and general effect of the rule to assist in a better

understanding of it. A brief analysis of each section of the rule is also included. However, attention is directed to the rule itself for a more complete understanding of its provisions. Further, the rule has been adopted in the contest of and in conjunction with several rules and amendments to rules and forms which the Commission has adopted or rescinded including:

1. Form 144 (17 CFR 239.144), Notice of Proposed Sale of Securities Pursuant to Rule 144;

2. Amendments to Forms 10-K (17 CFR 249.310) and 10-Q (17 CFR 249.308a) under the Securities Exchange Act of 1934 (Exchange Act) (Exchange Act Releases Nos. 9442 and 9443, 37 F.R. 600,601);

3. Amendments to Regulation A (17 CFR 230.251-230.263) under Section 3(b) of the Act (Securities Act Release No. 5225, 37 F.R. 599);

4. Rule 15c2-11 (17 CFR 240.15c2-11) under the Exchange Act (Exchange Act Release No. 9310; 36 F.R. 18641);

5. Rescission of Rule 155 (17 CFR 230.155) under the Act;

6. Rescission of Rule 154 (17 CFR 230.154) under the Act;

7. Publication of a release relating to the applicability of the antifraud provisions of the securities acts to certain practices in connection with transactions by issuers and others not involving any public offering (Securities Act Release No. 5226 and Exchange Act Release No. 9444 (37 F.R. 600); and

8. Rule 237 (17 CFR 230.237)-under section 3(b) of the Act (Securities Act Release No. 522 (37 F.R. 590).

The Commission is hereby specifically withdrawing its previously proposed "160 Series" of rules (Securities Act Release No. 4997 (35 F.R. 15447)).

Rule 144 will become effective on and after April 15, 1972.

In brief, the rule provides that any affiliate or other person who sells restricted securities of an issuer for his own account, or any person who sells restricted or any other securities for the account of an affiliate of the issuer, is not deemed to be engaged in a distribution of the securities, and therefore is not an underwriter as defined in section 2(11) of the Act, if the securities are sold in accordance with all the terms and conditions of the rule. The rule requires, among other things, that the restricted securities must have been beneficially owned for a period of at least 2 years by the person for whose account they are sold; that the amount sold shall not exceed 1 percent of the class outstanding, or if traded on an exchange, the lesser of that amount or the average weekly volume on all such exchanges during the 4 weeks preceding the sale; and that the securities must be sold in brokers' transactions. In addition, there must be adequate information available to the public in regard to the issuer of the securities and notice of the sale (Form 144) must be filed with the Commission concurrently with the sale.

A number of persons have commented that it is not clear whether the rule, as proposed, was intended to be the exclusive means for selling restricted securities without registration under the Securities Act. In this connection,

certain commentators asserted that the Commission does not have the statutory authority to adopt such an exclusive rule while others stated that the Commission had such power and urged it to adopt an exclusive rule. The Commission does not believe it is necessary to reach these questions relating to its statutory authority at this time, since the rule as adopted is not exclusive. However, persons who offer or sell restricted securities without complying with Rule 144 are hereby put on notice by the Commission that in view of the broad remedial purposes of the Act and of public policy which strongly supports registration, they will have a substantial burden of proof in establishing that an exemption from registration is available for such offers or sales and that such persons and the brokers and other persons who participate in the transactions do so at their risk.

Moreover, with respect to restricted securities acquired after the effective date of the rule, the staff will not issue "no-action" letters relating to resales of such securities. Further, in connection with such resales, the Commission hereby puts all persons including brokers and attorneys on notice that "the change in circumstances" concept should no longer be considered as one of the factors in determining whether a person is an underwriter. The Commission recognizes that this concept has been in existence in one form or another for a long period of time. However, administrative agencies as well as courts from to time change their interpretation of statutory provisions in the light of new

considerations and changing conditions which indicate that earlier interpretations of such provisions are no longer in keeping with the statutory objectives. Thus, the "change in circumstances" concept in the Commission's opinion fails to meet the objectives of the Act, since the circumstances of the seller are unrelated to the need of investors for the protections afforded by the registration and other provisions of the Act.

Further, with respect to restricted securities acquired after the effective date of the rule but not sold pursuant to the provisions of the rule, the Commission hereby gives notice that in deciding whether a person is an underwriter, the length of time the securities have been held will be considered but the fact that securities have been held for a particular period of time does not by itself establish the availability of an exemption from registration.

In order to assist in a better understanding of this rule, the release contains a general discussion of its background, purpose and general effect.

BACKGROUND AND PURPOSE

Congress, in enacting the Federal securities statutes, created a continuous disclosure system designed to protect investors and to assure the maintenance of fair and honest securities markets. The Commission in administering and implementing the objectives of these statutes has sought to coordinate and integrate this disclosure system, and the rule and other related rules and amendments are a further effort in this direction.

Rule 144 is designed to implement the fundamental purposes of the Act as expressed in its preamble:

"To provide full and fair disclosure of the character of the securities sold in interstate commerce and through the mails, and to prevent fraud in the sale thereof * * * "

The rule would also operate to inhibit the creation of public markets in securities of issuers concerning which adequate current information is not available to the public. At the same time, where adequate current information concerning an issuer is available to the public, the rule would permit the public sale in ordinary trading transactions of limited quantities of securities owned by persons controlling, controlled by or under common control with the issuer (hereinafter "affiliate") and by persons who have acquired restricted securities of the issuer.

This approach is consistent with the philosophy underlying the Act, that a disclosure law would provide the best protection for investors. In other words, if the investor had available to him all the material facts concerning a security, he would then be in a position to make an informed judgment whether or not to buy. In order to provide such information to investors, Congress determined that a distribution of securities requires the filing of a registration statement with the Commission and the delivery to investors of a prospectus containing accurate and current information concerning the issuer and its securities.

Exemptions from the registration requirements were provided for certain types of securities and securities transactions where there was no practical need for registration or where the benefits of registration were too remote.[1]

Among these exemptions is that provided by section 4(2) of the Act for transactions by an issuer not involving any public offering (private placements). This exemption was originally intended to permit an issuer to make a specific or isolated sale of its securities to a particular person,[2] such as an insurance company. The exemption is available for offerings to persons having access to substantially the same information concerning the issuer which registration would provide and who are able to fend for themselves.[3]

Resales of securities acquired in private placements are frequently made under claims of an exemption pursuant to section 4(1) of the Act, that is, a transaction by a person other than an issuer, underwriter, or dealer. This section was intended to exempt only trading transactions between individual investors with respect to securities already issued and not to exempt distributions by issuers or acts of other individuals who engage in steps necessary to such distributions.[4]

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[1] H.Rep. No.85, 73d Cong. first sess. (1933) p.5.

[2] Id. at 15-16.

[3] "SEC v. Ralston Purina Co.," 346 U.S. 119 (1953)

[4] Securities and Exchange Commission v. Chinese Consol. Benev. Ass'n.," 120 F2d 738 (2d Cir. 1941), certiorari denied, 314 U.S. 618.

Generally, the majority of questions arising under this Section have dealt with whether the seller is an "underwriter." The term underwriter is broadly defined in Section 2(11) of the Act to mean any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking. The interpretation of this definition has traditionally focused on the words "with a view to" in the phrase "purchased from an issuer with a view to . . . distribution." Thus, an investment banking firm which arranges with an issuer for the public sale of its securities is clearly an "underwriter" under that Section. Not so well understood is the fact that individual investors who are not professionals in the securities business may be "underwriters" within the meaning of that term as used in the Act if they act as links in a chain of transactions through which securities move from an issuer to the public. It is difficult to ascertain the mental state of the purchaser at the time of his acquisition, and the staff has looked to subsequent acts and circumstances to determine whether such person took with a view to distribution at the time of his acquisition. Emphasis has been placed on factors such as the length of time the person has held the securities ("holding period") and whether there has been an unforeseeable change in circumstances of the holder. Experience has

shown, however, that reliance upon such factors as the above has not assured adequate protection of investors through the maintenance of informed trading markets and has led to uncertainty in the application of the registration provisions of the Act.

Moreover, the Commission hereby emphasizes and draws attention to the fact that the statutory language of Section 2(11) is in the disjunctive. Thus, it is insufficient to conclude that a person is not an underwriter solely because he did not purchase securities from an issuer with a view to their distribution. It must also be established that the person is not offering or selling for an issuer in connection with the distribution of the securities and that the person does not participate or have a participation in any such undertaking, and does not participate or have a participation in the underwriting of any such undertaking.

Rule 144, together with the other related rules and amendments, is designed to provide full and fair disclosure of the character of securities sold in trading transactions and to create greater certainty and predictability in the application of the registration provisions of the Act by replacing subjective standards with more objective ones.

Explanation and Analysis of the Rule.

In view of the legislative history, statutory language and judicial interpretations of Sections 2(11), 4(1), and 4(2) of the Act, and in light of the many helpful suggestions and comments received on the proposed "160 Series" of

rules and thereafter on proposed Rule 144, the Commission is of the view that "distribution" is the significant concept in interpreting the statutory term "underwriter." In determining when a person is deemed not to be engaged in a distribution several factors must be considered.

First, the purpose and underlying policy of the Act to protect investors requires, in the Commissions's opinion, that there be adequate current information concerning the issuer, whether the resales of securities by persons result in a distribution or are effected in trading transactions. Accordingly, the availability of the rule is conditioned on the existence of adequate current public information.

Secondly, a holding period prior to resale is essential, among other reason, to assure that those persons who buy under a claim of a Section 4(2) exemption have assumed the economic risks of investment, and therefore, are not acting as conduits for sale to the public of unregistered securities, directly or indirectly, on behalf of an issuer. It should be noted that there is nothing in Section 2(11) which places a time limit on a person's status as underwriter. The public has the same need for protection afforded by registration whether the securities are distributed shortly after their purchase or after a considerable length of time.[5]

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[5]The Commission is aware that certain commentators have asserted that the absence of a cut-off period would constitute an unreasonable restraint on

A third factor, which must be considered in determining what is deemed not to constitute a "distribution," is the impact of the particular transaction or transactions on the trading markets.

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[5](Cont'd) the alienation of personal property. Generally speaking, the Commission does not concur in this view. As mentioned below, the rule would operate prospectively and permits limited resales of securities in trading transactions consistent with the purposes of the Act. Such limitation is reasonable since the holder of unregistered securities may resell his securities to persons who have access to adequate and current information concerning the issuer, and who do not need the protection of registration or he may contract for registration or for filing under Regulation A for subsequent resales, if he desires to distribute his restricted securities. In addition, as discussed below, the Commission has adopted Rule 237 under Section 3(b) of the Act which permits non-controlling persons who have owned for five years or more securities of an issuer, which is actively engaged in business as a going concern, to make offerings of such securities in amounts not exceeding the lesser of the gross proceeds from the sale of one percent of the securities of the class outstanding or $50,000 in aggregate gross proceeds during any twelve-month period by filing a simple notification with the appropriate regional office of the Commission, provided the securities are sold in negotiated rather than trading transactions.

It is consistent with the rationale of the Act that Section 4(1) be interpreted to permit only routine trading transactions as distinguished from distributions. Therefore, a person reselling securities under Section 4(1) of the Act must sell the securities in such limited quantities and in such a manner so as not to disrupt the trading markets. The larger the amount of securities involved, the more likely it is that such resales may involve methods of offering and amounts of compensation usually associated with a distribution rather than routine trading transactions. Thus, solicitation of buy orders or the payment of extra compensation are not permitted by the rule.

In summary, if the sale in question is made in accordance with all the provisions of the rule, as outlined below, any person who sells restricted securities shall be deemed not to be engaged in a distribution of such securities and therefore not an underwriter thereof. The rule also provides that any person who sells restricted or other securities on behalf of a person in a control relationship with the issuer shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter thereof, if the sale is made in accordance with all the conditions of the rule.

SYNOPSIS OF THE RULE

Preliminary Note.

A preliminary note has been added to the rule in order to provide a convenient reference to assist in

understanding and interpreting its provisions.

Definitions.

The term "restricted security" is defined to mean securities acquired directly or indirectly from an issuer, or from a person in a control relationship with such an issuer (an affiliate) in a transaction or chain of transactions not involving any public offering.

The definition of the term "person" has been revised in light of comments received on the proposed rule. Broadly speaking, the term "person" is defined to include certain relatives of the seller, certain trusts and estates in which the seller and such relatives collectively own 10 percent or more of the beneficial interest and corporations or other organizations in which the foregoing, collectively, are the beneficial owners of 10 percent or more of any class of the equity securities or 10 percent or more of the equity interest. The specific definition in the rule should be borne in mind in construing the various provisions of the rule and in preparing the required notice on Form 144.

Availability of Public Information.

The rule provides that there shall be available adequate current public information with respect to the issuer of the securities. This provision is deemed satisfied if an issuer has been subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act for a period of at least 90 days

immediately preceding the sale of the securities and has filed all reports required by that Act and the rules and regulations thereunder and in addition has filed the most recent annual report required to be filed thereunder.

Under concurrently adopted amendments to Forms 10-K and 10-Q, issuers are required to state in their annual and quarterly reports whether they have filed all the reports required by Section 13 or 15(d) of the Exchange Act during the 90-day period preceding the date of the report and in addition have filed the most recent annual report required to be filed. In light of comments received, the rule has been revised to provide that the person proposing to sell securities or the broker through whom they are to be sold shall be entitled to rely upon the issuer's statement in the latest such report that all required reports have been filed or upon a written statement from the issuer that all such reports have been filed, unless he knows or has reason to believe that the issuer has not complied with such requirements.

The Commission recognizes that small companies may experience difficulty in complying with the registration requirements of the Exchange Act, particularly in furnishing audited financial statements for three fiscal years as required by Form 10 (17 CFR 249.210). The Commission, however, believes that it would be in the interest of protection of investors for such issuers to be reporting companies under the Exchange Act, and therefore, encourages such issuers to register securities voluntarily, if they are in a position to otherwise comply and continue to

comply with the provisions of the Exchange Act. In this regard, Rule 12b-21 (17 CFR 240.12b-21) and Instruction 15 of Instructions to Financial Statements in Form 10 under the Exchange Act permit omission of certain information subject to specified conditions.

In case of companies which are not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, the information requirement is deemed to be met if there is publicly available with respect to the issuer, the information required by clauses (1) to (14), inclusive, and clause (16) of paragraph (a)(4) of Rule 15c2-11 (17 CFR 240.15c2-11) under the Exchange Act (Release No. 9310). This information includes among other things, the exact name of the issuer, the address of its principal executive offices, the exact title and class of the security, the number of shares or total amount of the security outstanding, the nature and extent of the issuer's facilities and the product or service offered, and financial information concerning the issuer including its most recent balance sheet and profit and loss statement, which shall be reasonably current. In addition, the rule, as adopted, has been revised to provide that in the case of insurance companies which are not subject to the reporting requirements of Section 13 or 15(d), the information requirement is deemed to be met if the reports required are filed with the regulatory authority of the company's state of domicile.

Holding Period

Securities sold in reliance upon the

rule must have been beneficially owned and fully paid for by the seller for a holding period of at least two years prior to his sale as specified below. This condition is designed to assure that the registration provisions of the Act are not circumvented by persons acting, directly or indirectly, as conduits for an issuer in connection with resales of restricted securities. In order to accomplish this, the rule provides that such persons be subject to the full economic risks of investment during the holding period. Accordingly, the rule provides that giving the person from whom the securities were purchased promissory notes or other obligations to pay the purchase price, or entering into an installment purchase contract with such person, will not constitute payment of the purchase price unless certain conditions are met. These conditions are that the promissory note, obligation or contract must provide for full recourse against the purchaser of the securities, must be adequately secured by collateral other than the securities purchased and must have been discharged by payment in full prior to the sale of the securities.

There have been various holding periods provided for in proposed rules and applied over the years by administrative interpretations. After reexamination and reconsideration, the Commission believes, in keeping with the purposes of the Act in preventing the distribution of unregistered securities to the public, that the holding period should be 2 years in the context of the other provisions of the rule. The definitive holding period provided in the rule may be relied on only in

connection with sales made pursuant to the rule.

For the purpose of the rule, the doctrine of "fungibility" will not apply. That is, the acquisition during the two-year period of other securities of the same issuer, whether restricted or nonrestricted, will not start the holding period running anew. However, a new provision has been added to the rule dealing with short sales, puts or other options to sell securities. The provision requires that if the securities sold are equity securities there shall be excluded in determining the holding period any period during which the seller had a short position in, or any put or other option to dispose of, any securities of the same class or any securities convertible into securities of such class. If the securities sold are nonconvertible debt securities, there must be excluded any period during which the seller had a short position in, or any put or other option to dispose of, any nonconvertible debt securities of the same issuer.

Certain securities acquired in connection with, or as a result of, ownership or acquisition of other securities, are deemed to have been acquired when such other securities were acquired. These include stock dividends (including stock dividends on securities initially acquired as stock dividends), stock splits, stock acquired in recapitalizations, conversions or contingent issuances of securities. The rule, as adopted, includes provision for contingent issuance of securities in a stock for stock transaction as well as in the stock for assets transaction provided for in the rule as proposed.

In view of the fact that the rule covers resales of restricted convertible securities and the restricted securities issued on their conversion, Rule 155 pertaining to convertible securities has been rescinded except with respect to securities acquired prior to the effective date of the rule and not sold in accordance with all the provisions of the rule.

Tacking of holding periods will be permitted for bona fide pledgees, donees, and trusts since it is considered that such persons when they sell the securities stand in the place of their respective pledgors, donors or settlors. In the case of an estate which is an affiliate, tacking of the holding period will be permitted, but as set forth below, there would be a limitations on the amount resold. In the event the estate is not an affiliate, there will be no holding period requirement and no limitation on the amount, but provisions of the rule relating to current public information, manner of sale, notice of sale and bona fide intention to sell shall apply.

A purchaser in a private placement or series of private placements would not be permitted to tack the holding period of the prior owner. In addition, there would be limitations on the amount of restricted securities resold as indicated below:

Limitation on Amount of Securities Sold

If the securities are traded on a registered national securities exchange, the amount which may be sold in any 6-month period shall not exceed the lesser of one percent of the amount of

the class outstanding as shown in the most recent report or statement published by the issuer, or the average weekly reported volume of trading on all such exchanges over the four-week period prior to the date of the required notice of sale described below. The average weekly reported volume standard has been selected for purposes of computing the amount rather than the largest aggregate reported volume during any week within the four calendar weeks preceding the receipt of the order which is the standard in Rule 154. This standard was selected because the Commission believes that the increase in reported "block" trades may result in substantial fluctuations in reported volume in any one week of a four-week period. Accordingly, one week's trading volume would not necessarily provide a meaningful indication of regular trading volume. If the securities are not traded on an exchange, the amount which may be sold in any 6-month period shall not exceed one percent of the amount of the class outstanding as shown in the most recent report or statement published by the issuer. In computing the limitation on the amount, the securities sold in private placements or covered by a registration statement under the Act or pursuant to an exemption under Regulation A under the Act are not included. However, any sales pursuant to Rule 237, discussed below, would be aggregated.

In light of the comments received on the provisions of the rule, as proposed, relating to aggregation of the sales of restricted securities by various persons, the aggregation provisions of the rule, as adopted, have been revised.

The rule provides that, if a holder of restricted securities sells such securities in a private placement, the purchaser's resales can only be made following a new two-year holding period and need not be aggregated with any amount of securities sold by the seller after that period. However, resales of restricted securities by all persons agreeing to act in concert shall be aggregated. Amounts sold by a donee or trust, during any period of six months within two years after the acquisition of the securities by the donee or trust, shall be aggregated with those sold by the donor or settlor. Amounts of securities sold for the account of a pledgee or purchaser of pledged securities during any period of six months within two years after a default in the obligation secured by the pledge, shall be aggregated with the amount of securities sold by the pledgor. Since the donee, trust and pledgee stands in the "shoes" of the donor, settlor, and pledgor, the former persons are subject to the latter persons' limitations under the rule. The purpose of limited aggregation is consistent with the objectives of the Act, for otherwise a distribution or redistribution may be effectuated by such means as gifts, pledges and trusts.

In computing the amount of securities an affiliate may sell pursuant to the rule, sales of nonrestricted securities would be aggregated with sales of restricted securities. Further, resales of securities by affiliates who agree to act in concert with respect to such securities shall be aggregated.

Should reliable volume figures

become publicly available through the automated quotation service of NASD, Inc. (NASDAQ), the Commission will consider amending the rule relating to over-the-counter companies to base the amount of securities which may be sold on such volume, as in the case of securites listed on exchanges.

The rule permits sales within successive 6-month periods, but no accumulations would be permitted. For example, the holder of restricted securities of an over-the-counter company may sell up to one percent in every successive 6 months, subject to the aggregation provisions where applicable, but he cannot skip 6 months and then sell an accumulated two percent in the following 6 months.

Manner of Sale.

The rule provides that the securities shall be sold in brokers' transactions within the meaning of section 4(4) of the Act, and that the person selling the securities shall not solicit or arrange for the solicitation of buy orders or make any payment in connection with the sale other than to the broker who executes the sell order.

Brokers' transactions are defined in the rule to include transactions in which a broker does no more than execute a sell order as agent and receives no more than the usual and customary commission. The broker may not solicit buy orders, but he may inquire of other brokers or dealers who have indicated an interest in the securities within the preceding 60 days.[6]

[6]The "160 Series" and Rule 144, as

In addition, the rules provides that the broker shall make a reasonable inquiry to ascertain whether the seller is engaged in a distribution. Reasonable inquiry should include, among other matters, inquiry as to the length of time the seller has held the securities; the amount of securities the seller and "chargeable" persons have sold in the past six months; whether he intends to sell securities of the same class through any other means; the number of shares of the class outstanding or the relevant trading volume; and whether the seller has solicited or made any arrangement for the solicitation of buy orders, or has made any payment to any other person in connection with the proposed transaction.

Because Rule 144 covers "brokers' transactions" in Section 4(4) of the Act, Rule 154 (17 CFR 230.154) has been rescinded.

Notice of Offering.

The rule requires that a person desiring to sell securities in reliance upon the rule must file with the Commission a notice to that effect. The notice must be transmitted to the

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[6](Cont'd) initially proposed, would also have permitted the broker to insert quotations in an inter-dealer quotation service. However, such a provision would raise questions of conflict with the anti-manipulative provisions of Rule 10b-6 under the Exchange Act and accordingly has been deleted.

Commission concurrently with the placing with a broker of an order for the sale of the securities. A form of notice is attached. If all of the securities mentioned in the notice are not sold within 90 days after the filing of the notice, an amended notice must be transmitted to the Commission concurrently with the commencement of any further sales of the securities. The notice will be a public document. A notice is not required to be filed with respect to transactions during any period of six months involving not more than 500 shares or other units or $10,000 whichever is less.

Bona Fide Intention to Sell.

In order to avoid persons filing any notice of offering "for the shelf," the rule provides that a person shall have a bona fide intention to sell the securities within a reasonable time after the filing of the notice.

OPERATION OF THE RULE

The rule will apply on a prospective basis to transactions in restricted securities acquired after the effective date of the rule. With respect to restricted securities acquired by a non-controlling person prior to the effective date of the rule, such persons would have the choice of complying with the new rule or the administrative interpretations in effect at the time of his resale. Brokers who act as agents for controlling persons in connection with the sale of restricted and other securities acquired prior to the effective date of the rule, will be

required to comply with the provisions of the new rule in order for their transactions to be exempt from registration pursuant to Section 4(4) of the Act. The provisions of the rule would be strictly construed and persons selling pursuant to the rule would have the burden of proving its availability.

The staff will not issue no-action letters with respect to resales of securities acquired after the effective date of the rule, but would issue interpretative letters to assist persons in complying with the new rule. In connection with securities acquired prior to the adoption of the rule, the staff would continue to issue no-action letters. In this regard, Release No. 5186 proposing Rule 144 stated that the staff would no longer give weight to the "change in circumstances" concept in issuing "no-action" letters. This has been reconsidered and it has been determined that solely with respect to securities acquired prior to the adoption of the rule, the staff will continue to consider "changes in circumstances" in issuing "no-action" letters for to do otherwise at this time appears unfair due to the retroactive effect. As to the aplication of the "change in circumstances" concept to resales of restricted securities acquired subsequent to the effective date of this rule, attention is drawn to the Commission's position previously stated on page 3 of this release.

In view of the objectives and policies underlying the Act, the rule shall not be available to any individual or entity with respect to any transaction which, although in technical compliance with the provisions of the

rule, is part of a plan by such individual or entity to distribute or redistribute securities to the public. In such case, registration is required.

While Rule 144 relates to transactions exempted by Sections 4(1) and 4(4) of the Act from the registration provisions of Section 5, it would not provide an exemption from the anti-fraud provisions of the securities laws or the civil liabilities provisions of Section 12(2) of the Act or other provisions of the securities laws.

It should be recognized that the rule is in the nature of an experiment and the Commission will observe its operation to determine whether it is consistent with the objectives of the Act. If experience with the rule indicates that it is not operating for the protection of investors, it will be rescinded or appropriately amended.

RELATED RULES AND OTHER AMENDMENTS

Rule 237

The Commission recognized that noncontrolling persons owning restricted securities of issuers which do not satisfy all of the conditions of Rule 144 might have difficulty in selling those securities due to circumstances beyond their control. Accordingly, in order to avoid unduly restricting the liquidity of such investments, the Commission has adopted Rule 237 under Section 3(b) of the Act. Under that rule any person satisfying the conditions of the rule will be permitted to sell an amount of securities not exceeding the lesser of the gross proceeds from the sale of one percent of

the securities of the class outstanding or $50,000 during any twelve month period, reduced by the amount of any other sales pursuant to an exemption under Section 3(b) of the Act or Rule 144 during the period. Those conditions are:

1. The person[7] is not an issuer, an affiliate of the issuer or a broker or dealer;

2. The person has owned and fully paid for the securities for five or more years;

3. The issuer is a domestic organization which has been actively engaged in business as a going concern for at least the last five years.

4. The securities are sold in negotiated transactions otherwise than through a broker or dealer; and

5. The person files the required notice with the appropriate regional office of the Commission at least 10 days before the sale, indicating, among other things, his name, the name of the issuer, the amount of securities to be sold and the amount sold within the past 12 months.

Regulation A

The Commission has adopted amendments to Regulation A so that an offering not to exceed $100,000 can be made by non-controlling persons, or an aggregate of $300,000 by all such persons, during any one year without offseting such amounts against the amount available to the issuer under a

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[7]Defined as in Rule 144(a)(2) above.

Regulation A offering. This broadening of the availability of Regulation A will provide a means by which noncontrolling investors in small businesses may resell their restricted securities.

Amendments to Form 10-K and Form 10-Q.

As mentioned previously, the Commission has adopted amendments to Forms 10-K and 10-Q to require a statement by the registrant that all filings required to be made have been made during the preceding 90 days and in addition that the registrant has filed the most recent annual report required to be filed.

The Commission has adopted further amendments to these forms requiring certain information relating to the issuance of unregistered securities in reliance upon an exemption from registration under the Act.

Applicability of the Anti-Fraud Provisions to Sales of Restricted Securities.

Although private offerings are exempt from the registration provisions of the Act by virtue of Section 4(2), that exemption does not apply to a public resale of the securities by the purchaser. The Commission is particularly concerned about the position in which purchasers of such securities find themselves when they later desire to resell the securities. The anti-fraud provisions of the Securities Act, including Section 17(a) of the Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, make it unlawful, in connection with the

purchase or sale of a security, to make misleading statements or to omit the disclosure of material facts, and prohibit other fraudulent or deceptive practices. The Commission is of the opinion that these provisions are violated when an issuer, an affiliate of the issuer, or other persons, in connection with a private placement of securities, fail to inform the purchaser fully as to the circumstances under which he is required to take and hold the securities and the limitations upon their resale. A more detailed release concerning these matters has been issued in connection with the adoption of Rule 144 and the related rules and amendments.

Use of Legends and Stop-Transfer Instructions.

Precautions by issuers are essential to assure that a public offering does not result from resale of securities initially purchased in transactions claimed to be exempt under Section 4(2) of the Act. (Attention is directed to Securities Act Release No. 5121 which discusses the use of legends and stop-transfer instructions as evidence of a non-public offering.) Although such assurance cannot be obtained merely by the use of an appropriate legend on stock certificates or other evidences of ownership, or by appropriate instructions to transfer agents, these devices serve a useful policing function, and the use of such devices is strongly suggested by the Commission and will be considered a factor in determining whether in fact there has been a private placement.

Contractual Registration or Other Rights for Resale of Restricted Securities.

Issuers, brokers, dealers, private placees and other holders of restricted securities are hereby put on notice that the Commission deems it appropriate that such persons when acquiring such securities, should consider contracting for registration or other rights, so that, if they desire to distribute their securities rather than resell in trading transactions pursuant to the rule, they can do so in a manner consistent with the provisions of the Act, i.e., by filing a registration statement or a notification under Regulation A. If the issuer does not file reports pursuant to Sections 13 or 15(d) of the Exchange Act, such persons should consider obtaining an agreement by the issuer to register voluntarily under that Act so that Rule 144 may be available.

Business Combinations.

On October 9, 1969, the Commission gave notice of proposed revisions to Rule 133 (17 CFR 230.133) and Form S-14 (17 CFR 239.23), of proposed new Rules 153A (17 CFR 230.153A) and 181 (17 CFR 230.181) under the Act and of proposed amendment to Rule 14a-2 (17 CFR 240.14a-2) of Regulation 14A under the Exchange Act (Release No. 8711; 34 F.R. 17180). Comments have been received and the staff is currently preparing its recommendations for submission to the Commission for decision in the near future.

Short Form Registration Under the Securities Act.

The Commission has amended Form S-7

(17 CFR 239.26) to expand its coverage and has recently proposed amendments to Forms S-16 (17 CFR 239.27; see 36 F.R. 23256) which simplifies registration of securities offered by persons other than the issuer, securities offered in certain conversions and securities to be issued on the exercise of certain warrants. The Commission is observing the operation of these forms, and may at a later date broaden their availability if it appears to be in the public interest and consistent with the protection of investors.

Commission Action:

I. Part 230 of Chapter II of Title 17 of the Code of Federal Regulations is amended by adding thereunder a new Section 230.144 to read as follows and by rescinding Sections 230.154 and 230.155.

SECTION 230.144 PERSONS DEEMED NOT TO BE ENGAGED IN A DISTRIBUTION AND THEREFORE NOT UNDERWRITERS

PRELIMINARY NOTE

Rule 144 is designed to implement the fundamental purposes of the Act, as expressed in its preamble, "To provide full and fair disclosure of the character of the securities sold in interstate commerce and through the mails, and to prevent fraud in the sale thereof ..." The rule is designed to prohibit the creation of public markets in securities of issuers concerning which adequate current information is not available to the public. At the same time, where adequate current information concerning the issuer is

available to the public, the rule permits the public sale in ordinary trading transactions of limited amounts of securities owned by persons controlling, controlled by or under common control with the issuer and by persons who have acquired restricted securities of the issuer.

Certain basic principles are essential to an understanding of the requirement of registration in the Act:

1. If any person utilizes the jurisdictional means to sell any non-exempt security to any other person, the security must be registered unless a statutory exemption can be found for the transaction.

2. In addition to the exemptions found in Section 3, four exemptions applicable to transactions in securities are contained in Section 4. Three of these Section 4 exemptions are clearly not available to anyone acting as an "underwriter" of securities. (The fourth, found in Section 4(4), is available only to those who act as brokers under certain limited circumstances. An understanding of the term "underwriter" is therefore important to anyone who wishes to determine whether or not an exemption from registration is available for his sale of securities.

The term underwriter is broadly defined in Section 2(11) of the Act to mean any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking. The

interpretation of this definition has traditionally focused on the words "with a view to" in the phrase "purchased from an issuer with a view to .... distribution." Thus, an investment banking firm which arranges with an issuer for the public sale of its securities is clearly an "underwriter" under that Section. Individual investors who are not professionals in the securities business may also be "underwriters" within the meaning of that term as used in the Act if they act as links in a chain of transactions through which securities move from an issuer to the public. Since it is difficult to ascertain the mental state of the purchaser at the time of his acquisition, subsequent acts and circumstances have been considered to determine whether such person took with a view to distribution at the time of his acquisition. Emphasis has been placed on factors such as the length of time the person has held the securities and whether there has been an unforeseeable change in circumstances of the holder. Experience has shown, however, that reliance upon such factors as the above has not assured adequate protection of investors through the maintenance of informed trading markets and has led to uncertainty in the application of the registration provisions of the Act.

It should be noted that the statutory language of Section 2(11) is in the disjunctive. Thus, it is insufficient to conclude that a person is not an underwriter solely because he did not purchase securities from an issuer with a view to their distribution. It must also be established that the person is not offering or selling for an issuer in

connection with the distribution of the securities, does not participate or have a direct or indirect participation in any such undertaking, and does not participate or have a participation in the direct or indirect underwriting of such an undertaking.

In determining when a person is deemed not to be engaged in a distribution several factors must be considered.

First, the purpose and underlying policy of the Act to protect investors requires that there be adequate current information concerning the issuer, whether the resales of securities by persons result in a distribution or are effected in trading transactions. Accordingly, the availability of the rule is conditioned on the existence of adequate current public information.

Secondly, a holding period prior to resale is essential, among other reasons, to assure that those persons who buy under a claim of a Section 4(2) exemption have assumed the economic risks of investment, and therefore are not acting as conduits for sale to the public of unregistered securities, directly or indirectly, on behalf of an issuer. It should be noted that there is nothing in Section 2(11) which places a time limit on a person's status as an underwriter. The public has the same need for protection afforded by registration whether the securities are distributed shortly after their purchase or after a considerable length of time.

A third factor, which must be considered in determining what is deemed not to constitute a "distribution", is the impact of the particular transaction or transactions on the trading markets.

Section 4(1) was intended to exempt only routine trading transactions between individual investors with respect to securities already issued and not to exempt distributions by issuers or acts of other individuals who engage in steps necessary to such distributions. Therefore, a person reselling securities under Section 4(1) of the Act must sell the securities in such limited quantities and in such a manner as not to disrupt the trading markets. The larger the amount of securities involved, the more likely it is that such resales may involve methods of offering and amounts of compensations usually associated with a distribution rather than routine trading transactions. Thus, solicitation of buy orders or the payment of extra compensation are not permitted by the rule.

In summary, if the sale in question is made in accordance with all of the provisions of the rule, as set forth below, any person who sells restricted securities shall be deemed not to be engaged in a distribution of such securities and therefore not an underwriter thereof. The rule also provides that any person who sells restricted or other securities on behalf of a person in a control relationship with the issuer shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter thereof, if the sale is made in accordance with all the condition of the rule.

(a) Definitions. The following definitions shall apply for the purposes of this rule.

(1) An "affiliate" of an issuer is a

a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.

(2) The term "person" when used with reference to a person for whose account securities are to be sold in reliance upon this rule includes, in addition to such person, all of the following persons:

(i) Any relative or spouse of such person, or any relative of such spouse, any one of whom has the same home as such person;

(ii) Any trust or estate in which such person or any of the persons specified in (A) collectively own ten percent or more of the total beneficial interest or of which any of such persons serve as trustee, executor or in any similar capacity; and

(iii) Any corporation or other organization (other than the issuer) in which such person or any of the persons specified in (A) are the beneficial owners collectively of ten percent or more of any class of equity securities or ten percent or more of the equity interest.

(3) The term "restricted securities" means securities acquired directly or indirectly from the issuer thereof, or from an affiliate of such issuer, in a transaction or chain of transactions not involving any public offering.

(b) Conditions to be met. Any affiliate or other person who sells restricted securities of an issuer for his own account, or any person who sells restricted or any other securities for the account of an affiliate of the issuer of such securities, shall be deemed not to

be engaged in a distribution of such securities and therefore not to be an underwriter thereof within the meaning of Section 2(11) of the Act if all of the conditions of this rule are met.

(c) Current Public Information. There shall be available adequate current public information with respect to the issuer of the securities. Such information shall be deemed to be available only if either of the following conditions is met:

(1) Filing of Reports. The issuer has securities registered pursuant to Section 12 of the Securities Exchange Act of 1934 and has filed the reports required to be filed by Section 13 of that Act for a period of at least 90 days immediately preceding the sale of the securities and in addition has filed the most recent annual report required to be filed thereunder, or has securities registered pursuant to the Securities Act of 1933 and has filed the reports required to be filed by Section 15(d) of the Securities Exchange Act of 1934 for a period of at least 90 days immediately preceding the sale of the securities and in addition has filed the most recent annual report required to be filed thereunder. The person for whose account the securities are to be sold shall be entitled to rely upon a statement in whichever is the most recent report, quarterly or annual, required to be filed and filed by the issuer that such issuer has complied with such requirements, unless he knows or has reason to believe that the issuer has not complied with such requirements. Such person shall also be entitled to rely upon a written statement from the

issuer that it has complied with such reporting requirements unless he knows or has reason to believe that the issuer has not complied with such requirements.

(2) Other Public Information. If the issuer is not subject to Section 13 or 15(d) of the Securities Exchange Act of 1934, there is publicly available the information concerning the issuer specified in subdivision (i) to (xiv), inclusive, and subdivision (xvi) of paragraph (a)(4) of Section 240.15c2-11 of this chapter or, if the issuer is an insurance company, the information specified in section 12(g)(2)(G)(i) of that Act.

(d) Holding Period for Restricted Securities. If the securities sold are restricted securities, the following provisions apply:

(1) General Rule. The person for whose account the securities are sold shall have been the beneficial owner of the securities for a period of at least two years prior to the sale and, if the securities were purchased, the full purchase price or other consideration shall have been paid or given at least two years prior to the sale.

(2) Promissory Notes, Other Obligations or Installment Contracts. Giving the person from whom the securities were purchased a promissory note or other obligation to pay the purchase price, or entering into an installment purchase contract with such person, shall not be deemed full payment of the purchase price unless the promissory note, obligation or contract--

(i) Provides for full recourse against the purchaser of the securities;

(ii) Is secured by collateral, other

than the securities purchased, having a fair market value at least equal to the purchase price of the securities purchased; and

(iii) Shall have been discharged by payment in full prior to the sale of the securities.

(3) Short Sales, Puts or Other Options to Sell Securities. In computing the two-year holding period the following periods shall be excluded:

(i) If the securities sold are equity securities, there shall be excluded any period during which the person for whose account they are sold had a short position in, or any put or other option to dispose of, any equity securities of the same class or any securities convertible into securities of such class; and

(ii) If the securities sold are non-convertible debt securities, there shall be excluded any period during which the person for whose account they are sold had a short position in, or any put or other option to dispose of, any non-convertible debt securities of the same issuer.

(4) Determination of Holding Period. The following provisions shall apply for the purpose of determining the period securities have been held:

(i) Stock Dividends, Splits and Recapitalizations. Securities acquired from the issuer as a dividend or pursuant to a stock split, reverse split or recapitalization shall be deemed to have been acquired at the same time as the securities on which the dividend or, if more than one, the initial dividend was paid, the securities involved in the split or reverse split, or the securities surrendered in connection with the

recapitalization;

(ii) Conversions. If the securities sold were acquired from the issuer for a consideration consisting solely of other securities of the same issuer surrendered for conversion, the securities so acquired shall be deemed to have been acquired at the same time as the securities surrendered for conversion;

(iii) Contingent Issuance of Securities. Securities acquired as a contingent payment of the purchase price of an equity interest in a business, or the assets of a business, sold to the issuer or an affiliate of the issuer shall be deemed to have been acquired at the time of such sale if the issuer or affiliate was then commited to issue the securities subject only to conditions other than the payment of further consideration for such securities. An agreement entered into in connection with any such purchase to remain in the employment of, or not to compete with, the issuer or affiliate or the rendering of services pursuant to such agreement shall not be deemed to be the payment of further consideration for such securities.

(iv) Pledged Securities. Securities which are bona fide pledged by any person other than the issuer when sold by the pledgee, or by a purchaser, after a default in the obligation secured by the pledge, shall be deemed to have been acquired when they were acquired by the pledgor, except that if the securities were pledged without recourse they shall be deemed to have been acquired by the pledgee at the time of the pledge or by the purchaser at the time of the purchase.

NOTE: Securities sold by the pledgee shall be aggregated with those sold by the pledgor, as provided in paragraph (e)(3)(ii) of this section.

(v) Gifts of Securities. Securities acquired from any person, other than the issuer, by gift shall be deemed to have been acquired by the donee when they were acquired by the donor;

NOTE: Securities sold by the donee shall be aggregated with those sold by the donor, as provided in paragraph (e)(3)(iii) of this section.

(vi) Trusts. Securities acquired from the settlor of a trust by the trust or acquired from the trust by the beneficiaries thereof shall be deemed to have been acquired when they were acquired by the settlor;

NOTE: Securities sold by the trust shall be aggregated with those sold by the settlor of the trust, as provided in paragraph (e)(3)(iv) of this section.

(vii) Estates. Securities held by the estate of a deceased person or acquired from such an estate by the beneficiaries thereof shall be deemed to have been acquired when they were acquired by the deceased person, except that no holding period is required if the estate is not an affiliate of the issuer or if the securities are sold by a beneficiary of the estate who is not such an affiliate.

NOTES: (a) Securities sold by the estate shall be aggregated with those sold by the deceased person, as provided

in paragraph (e)(3)(v) of this section, if the estate is an affiliate of the issuer.

(b) While there is no holding period or amount limitation for estates and beneficiaries thereof which are not affiliates of the issuer, paragraphs (c), (f), (g), (h), and (i) of the section apply to securities sold by such persons in reliance upon the section.

(e) Limitation on Amount of Securities Sold. Except as hereinafter provided, the amount of securities which may be sold in reliance upon this rule shall be determined as follows:

(1) Sales by Affiliates. If restricted or other securities are sold for the account of an affiliate of the issuer, the amount of securities sold, together with all sales of restricted and other securities of the same class for the account of such person within the preceding six months, shall not exceed the following:

(i) If the securities are admitted to trading on a national securities exchange, the lesser of (a) 1 percent of the shares or other units of the class outstanding as shown by the most recent report or statement published by the issuer, or (b) the average weekly reported volume of trading in such securities on all securities exchanges during the 4 calendar weeks preceding the filing of the notice required by paragraph (h) of this section, or if no such notice is required the receipt of the order to execute the transaction by the broker; or

(ii) If the securities are not traded on a national securities exchange, 1 percent of the shares or other

units of the class outstanding as shown by the most recent report or statement published by the issuer.

(2) Sales by Persons other than Affiliates. The amount of restricted securities sold for the account of any person other than an affiliate of the issuer, together with all other sales of restricted securities of the same class for the account of such person within the preceding 6 months, shall not exceed the amount specified in subparagraph (1) (i) or (ii) of this paragraph, whichever is applicable.

(3) Determination of Amount. For the purpose of determining the amount of securities specified in subparagraphs (1) and (2) of this paragraph, the following provisions shall apply:

(i) Where both convertible securities and securities of the class into which they are convertible are sold, the amount of convertible securities sold shall be deemed to be the amount of securities of the class into which they are convertible for the purpose of determining the aggregate amount of securities of both classes sold;

(ii) The amount of securities sold for the account of a pledgee thereof, or for the account of a purchaser of the pledged securities, during any period of 6 months within 2 years after a default in the obligation secured by the pledge and the amount of securities sold during the same 6-month period for the account of the pledgor shall not exceed, in the aggregate, the amount specified in subparagraph (1) or (2) of this paragraph, whichever is applicable;

(iii) The amount of securities sold for the account of a donee thereof

during any period of 6 months within 2 years after the donation, and the amount of securities sold during the same 6-month period for the account of the donor, shall not exceed, in the aggregate, the amount specified in subparagraph (1) or (2) of this paragraph, whichever is applicable;

(iv) Where securities were acquired by a trust from the settlor of the trust, the amount of such securities sold for the account of the trust during any period of 6 months within 2 years after the acquisition of the securities by the trust, and the amount of securities sold during the same 6-month period for the account of the settlor, shall not exceed, in the aggregate, the amount specified in subparagraph (1) or (2) of this paragraph, whichever is applicable;

(v) The amount of securities sold for the account of the estate of a deceased person, or for the account of a beneficiary of such estate, during any period of 6 months and the amount of securities sold during the same period for the account of the deceased person prior to his death, shall not exceed, in the aggregate, the amount specified in subparagraph (1) or (2) of this paragraph, whichever is applicable: Provided, That no limitation on amount shall apply if the estate or beneficiary thereof is not an affiliate of the issuer;

(vi) When two or more affiliates or other persons agree to act in concert for the purpose of selling securities of an issuer, all securities of the same class sold for the account of all such persons during any period of 6 months shall be aggregated for the purpose of

determining the limitation on the amount of securities sold; and

(vii) Securities sold pursuant to an effective registration statement under the Act or pursuant to an exemption provided by section 4(2) of the Act or by Regulation A under the Act need not be included in determining the amount of securities sold in reliance upon this section.

(f) Manner of Sale. The securities shall be sold in "brokers' transactions" within the meaning of Section 4(4) of the Act and the person selling the securities shall not (1) solicit or arrange for the solicitation of orders to buy the securities in anticipation of or in connection with such transactions, or (2) make any payment in connection with the offering or sale of the securities to any person other than the broker who executes the order to sell the securities.

(g) Brokers' Transactions. The term "brokers' transactions" in Section 4(4) of the Act shall for the purpose of this rule be deemed to include transactions by a broker in which such broker--

(1) Does no more than execute the order or orders to sell the securities as agent for the person for whose account the securities are sold; and receives no more than the usual and customary broker's commission;

(2) Neither solicits nor arranges for the solicitation of customers' orders to buy the securities in anticipation of or in connection with the transaction; provided, that the foregoing shall not preclude inquiries by the broker or other brokers or dealers

who have indicated an interest in the securities within the preceding 60 days; and

(3) After reasonable inquiry is not aware of circumstances indicating that the person for whose account the securities are sold is an underwriter with respect to the securities or that the transaction is a part of a distribution of securities of the issuer. Without limiting the foregoing, the broker shall be deemed to be aware of any facts or statements contained in the notice required by paragraph (h) below.

NOTES: (i) The broker, for his own protection, should obtain and retain in his files a copy of the notice required by paragraph (h).

(ii) The reasonable inquiry required by paragraph (g)(3) above should include, but not necessarily be limited to, inquiry as to the following matters:

(a) The length of time the securities have been held by the person for whose account they are to be sold. If practicable, the inquiry should include physical inspection of the securities.

(b) The nature of the transaction in which the securities were acquired by such person;

(c) The amount of securities of the same class sold during the past six months by all persons whose sales are required to be taken into consideration pursuant to paragraph (e) above;

(d) Whether such person intends to sell additional securities of the same class through any other means;

(e) Whether such person has solicited or made any arrangement for the solicitation of buy orders in connection

with the proposed sale of securities;

(f) Whether such person has made any payment to any other person in connection with the proposed sale of the securities; and

(g) The number of shares or other units of the class outstanding, or the relevant trading volume.

(h) Notice of Proposed Sale. Concurrently with the placing with a broker of an order to execute a sale of any securities in reliance upon this rule, there shall be transmitted to the Commission, at its principal office in Washington, D.C., for filing three copies of a notice on Form 144 (Section 239.144 of this chapter) which shall be signed by the person for whose account the securities are to be sold: Provided, That such a notice need not be filed if the amount of securities to be sold during any period of six months does not exceed 500 shares or other units and the aggregate sale price thereof does not exceed $10,000. If all of the securities for which a notice is filed are not sold within 90 days after the filing of such notice, an amended notice shall be transmitted to the Commission concurrently with the commencement of any further sales of such securities. Neither the filing of such notice nor the failure of the Commission to comment thereon shall be deemed to preclude the Commission from taking any action it deems necessary or appropriate with respect to the sale of the securities referred to in such notice.

(i) Bona Fide Intention to Sell. The person filing the notice required by paragraph (h) shall have a bona fide

intention to sell the securities referred to therein within a reasonable time after the filing of such notice.

SECTIONS 230.154, 230.155 [RESCINDED]

II. Part 239 of Chapter II of Title 17 of the Code of Federal Regulations is amended by adding thereunder a new Section 239.144 reading as follows:

SECTION 239.144 FORM 144, FOR NOTICE OF PROPOSED SALE OF RESTRICTED SECURITIES PURSUANT TO SECTION 230.144 OF THIS CHAPTER.

(a) This form shall be filed in triplicate with the Commission by each person desiring to make an offering of restricted securities in reliance upon Section 230.144 of this chapter at least 10 days prior to the commencement of such offering. This form shall also be completed and filed by such person, if all such securities are not sold within 90 days after the filing of the initial notice on this form, as an amended notice of such proposed re-offering at least 10 days prior to any further sales of such securities. An amended Form 144 shall be filed at the expiration of each 90-day period following the prior filing if any unsold securities are to be reoffered thereafter, and at least 10 days prior to the commencement of the reoffering of such securities.

(b) The notice on Form 144 is not required to be filed with respect to transactions in which the initial offering of restricted securities involves not more than 500 shares or other units or $10,000, whichever is less.

NOTE: Copies of Form 144 have been filed with the Office of Federal Register as part of this document. Additional copies will be available upon request from the Securities and Exchange Commission, Washington, D.C. 20549.

The adoption of Rule 144 and Form 144, and the recission of Rule 154, are effective April 15, 1972. The recission of Rule 155 is also effective April 15, 1972, except that it shall remain in effect with respect to securities acquired prior to the effective date of Rule 144 and not sold thereafter in accordance with all the provisions of Rule 144.

The foregoing action was taken by the Commission pursuant to its authority under the Securities Act of 1933, particularly section 19(a) in conjunction with sections 2(11), 4(1), 4(2), and 4(4).

(Sec. 19(a), 48 Stat. 85; Sec. 209, 48 Stat. 908)

By the Commission.

[SEAL]

RONALD F. HUNT,
Secretary.

[FR Doc. 72-562 Filed 1-13-72, 8:46 am]

Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

(b) AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

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(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written

communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Securities Act of 1933, §1, 15 U.S.C. §77a

§ 77a. Short title

This subchapter may be cited as the "Securities Act of 1933."

Securities Act of 1933, §2, 15 U.S.C. §77b

§ 77b. Definitions

When used in this subchapter, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general,

any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell", "offer for sale", or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. The terms defined in this paragraph and the term "offer to buy" as used in subsection (c) of section 77e of this title shall not include preliminary negotiations or agreements between an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer) and any underwriter or among underwriters who are or are to be in privity of contract with an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer). Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been offered and sold for value. The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer or of another person, which right cannot be exercised until some future date, shall not be deemed to be an offer or sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security.

(4) The term "issuer" means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of direc-

tors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term "issuer" means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering.

(5) The term "Commission" means the Securities and Exchange Commission.

(6) The term "Territory" means Puerto Rico, Canal Zone, the Virgin Islands, and the insular possessions of the United States.

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

(8) The term "registration statement" means the statement provided for in section 77f of this title, and includes any amendment thereto and any report, document, or memorandum filed as part of such statement or incorporated therein by reference.

(9) The term "write" or "written" shall include printed, lithographed, or any means of graphic communication.

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security; except that (a) a communica-

tion sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of section 77j of this title) shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of subsection (a) of section 77j of this title at the time of [1] such communication was sent or given to the person to whom the communication was made, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of section 77j of this title may be obtained and, in addition, does no more than identify the security, state the price thereof, state by whom orders will be executed, and contain such other information as the Commission, by rules or regulations deemed necessary or appropriate in the public interest and for the protection of investors, and subject to such terms and conditions as may be prescribed therein, may permit.

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

(13) The term "insurance company" means a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner, or a similar official or agency, of a State or territory or the

District of Columbia; or any receiver or similar official or any liquidating agent for such company, in his capacity as such.

(14) The term "separate account" means an account established and maintained by an insurance company pursuant to the laws of any State or territory of the United States, the District of Columbia, or of Canada or any province thereof, under which income, gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(15) The term "accredited investor" shall mean—

(i) a bank as defined in section 77c(a)(2) of this title whether acting in its individual or fiduciary capacity; an insurance company as defined in paragraph (13); an investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; a Small Business Investment Company licensed by the Small Business Administration; or an employee benefit plan, including an individual retirement account, which is subject to the provisions of the Employee Retirement Income Security Act of 1974, if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act, which is either a bank, insurance company, or registered investment adviser; or

(ii) any person who, on the basis of such factors as financial sophistication, net worth, knowledge, and experience in financial matters, or amount of assets under management qualifies as an accredited investor under rules and regulations which the Commission shall prescribe.

Securities Act of 1933, §4, 15 U.S.C. §77d

§ 77d. Exempted transactions

The provisions of section 77e of this title shall not apply to—

(1) transactions by any person other than an issuer, underwriter, or dealer.

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(2) transactions by an issuer not involving any public offering.

(3) transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except—

(A) transactions taking place prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter,

(B) transactions in a security as to which a registration statement has been filed taking place prior to the expiration of forty days after the effective date of such registration statement or prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter after such effective date, whichever is later (excluding in the computation of such forty days any time during which a stop order issued under section 77h of this title is in effect as to the security), or such shorter period as the Commission may specify by rules and regulations or order, and

(C) transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

With respect to transactions referred to in clause (B), if securities of the issuer have not previously been sold pursuant to an earlier effective registration statement the applicable period, instead of forty days, shall be ninety days, or such shorter period as the Commission may specify by rules and regulations or order.

(4) brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders.

(5)(A) Transactions involving offers or sales of one or more promissory notes directly secured by a first lien on a single parcel of real estate upon which is located a dwelling or other residential or commercial structure, and participation interests in such notes—

(i) where such securities are originated by a savings and loan association, savings bank, commercial bank, or similar banking institution which is supervised and examined by a Federal or State authority, and are offered and sold subject to the following conditions:

(a) the minimum aggregate sales price per purchaser shall not be less than $250,000;

(b) the purchaser shall pay cash either at the time of the sale or within sixty days thereof; and

(c) each purchaser shall buy for his own account only; or

(ii) where such securities are originated by a mortgagee approved by the Secretary of Housing and Urban Development pursuant to sections 1709 and 1715b of Title 12 and are offered or sold subject to the three conditions specified in subparagraph (A)(i) to any institution described in such subparagraph or to any insurance company subject to the supervision of the insurance commissioner, or any agency or officer performing like function, of any State or territory of the United States or the District of Columbia, or the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, or the Government National Mortgage Association.

(B) Transactions between any of the entities described in subparagraph (A)(i) or (A)(ii) involving non-assignable contracts to buy or sell the foregoing securities which are to be completed within two years, where the seller of the foregoing securities pursuant to any such contract is one of the parties described in subparagraph (A)(i) or (A)(ii) who may originate such securities and the purchaser of such securities pursuant to any such contract is any institution described in subparagraph (A)(i) or any insurance company described in subparagraph (A)(ii), the Federal Home Loan Mortgage Corporation, Federal National Mortgage Association, or the Government National Mortgage Association and where the foregoing securities are subject to the three conditions for sale set forth in subparagraphs (A)(i)(a) through (c).

(C) The exemption provided by subparagraphs (A) and (B) shall not apply to resales of the securities acquired pursuant thereto, unless each of the conditions for sale contained in subparagraphs (A)(i)(a) through (c) are satisfied.

15 § 77d

(6) transactions involving offers or sales by an issuer solely to one or more accredited investors, if the aggregate offering price of an issue of securities offered in reliance on this paragraph does not exceed the amount allowed under section 77c(b) of this title, if there is no advertising or public solicitation in connection with the transaction by the issuer or anyone acting on the issuer's behalf, and if the issuer files such notice with the Commission as the Commission shall prescribe.

Securities Act of 1933, §5, 15 U.S.C. §77e

§ 77e. Prohibitions relating to interstate commerce and the mails

Sale or delivery after sale of unregistered securities

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

Necessity of prospectus meeting requirements of section 77j of this title

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a

prospectus that meets the requirements of subsection (a) of section 77j of this title.

Necessity of filing registration statement

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

§ 77s. Special powers of Commission

Rules and regulations; general matters; registration statements, prospectuses, and definitions; effective date; good faith compliance; forms

(a) The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms used in this subchapter. Among other things, the Commission shall have authority, for the purposes of this subchapter, to prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer. The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall

prescribe. No provision of this subchapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

[DISTRICT COURT - CAPTION 76-4150-Z]

PLAINTIFFS' REQUEST #1 FOR FINDINGS OF FACT ON ISSUES OF LIABILITY OF DEFENDANTS, THIRD PARTY PLAINTIFFFS-ARTHUR J. THOMSON AND FROST CONTROLS, INC.
[PARTIAL]

Plaintiffs request this honorable Court to make its findings of fact on issues of liability as follows:

III. On or about March 15, 1971, Frost Controls Corp. caused Certificate #1 for 5,000 shares of its capital stock to be issued to plaintiffs, U.E. Co. (Del).

[Thomson's admission #18 of June 9, 1977; Exhibit 21(b) - Stock Certificate.]

IV. U.E. Co. (Del) was registered upon the stock transfer records as record owner of the 5,000 shares as original issue.

[Exhibit 1(j) - Stock Transfer Ledger.]

V. U.E. Co. (Del) has remained as sole record owner of the 5,000 shares from March 15, 1971 to date.

[Exhibit 1(j) - Stock Transfer Ledger.]

X. By the terms of the certificate the 5,000 shares of Frost Controls Corp. were transferable only upon the books of the Corporation upon surrender of the certificate properly endorsed.

[Thomson's admission #24 of June 9, 1977; Exhibit 21(b) - Stock Certificate.]

XIII. In 1973/1974 Fred D. Gearhart was a substantial shareholder of General Electronics, Inc., being owner of approximately 8% of its common stock; E.V. Otis also was a substantial shareholder of General Electronics, Inc., being owner of approximately 5% of its common stock.

[Record at trial - Testimony of Gasparik, testimony of Thomson]

XIV. General Electronics, Inc. is a small, publicly owned corporation having in excess of 10,000 shareholders.

[Record at trial - Testimony of Gasparik.]

XXI. The net worth-book value of Frost Corp.'s assets as of December 31, 1973 was $455,488.71 after giving effect to an add-back of $32,285 management bonus taken by Arthur J. Thomson.

[Exhibit 3(a) as to Paid In Capital $5,000; findings XVI and XVII as to Paid In Capital Surplus $297,630.19; Findings XVIII, XIX, and XX as to Earned Surplus; Exhibit 3(e) as to management bonus taken, Frost Corp. Financial Statement 1973.]

XXII. The book value of the materials inventory of Frost Corp. as of October 21, 1974 was $220,953.31.

[Exhibit 27(r)(11) - Frost Corp.'s Trial Balance for October 21, 1974.]

XXIII. The net book value of Frost Corp.'s machinery and equipment as of October 21, 1974 was $79,182.21.

[Exhibit 27(r)(11) - Frost

Corp.'s Trial Balance for October 21, 1974, which reflects Machinery and Equipment $94,797.98; Office Equipment $492.84; Leasehold Improvements $2,951.62; Tools, Jigs, Dies, and Molds $15,144.50; In-House Tools and Dies $1,514.43. Total = $114,901.37, less reserve for depreciation $35,719.16 = Net Machinery and Equipment $79,182.21.]

XXIV. The net book value of Frost Corp.'s cash items as of October 21, 1974 was $108,973.97.

[Exhibit 27(r)(11) - Frost Corp.'s Trial Balance for October 21, 1974, which reflects Cash - General Account $2,701.18; Cash $105,944.13; Cash - Payroll and Tax Account $294.63; Petty Cash $34.03. Total $108,973.97.]

XXV. The value of Frost Corp.'s cash items as of October 21, 1974 was $141,259 which reflects the add-back of $32,285 unauthorized bonus taken by Thomson to Cash on Hand of $108,973.97.

[Finding XXIV as to $108,973.97 and Exhibit 3(e) as to management bonus taken - Frost Corp. Financial Statement 1973.]

XXVI. The net book value of Frost Corp.'s Accounts Receivable as of October 21, 1974 was $94,097.15.

[Exhibit 27(r)(11) - Frost Corp.'s Trial Balance of October 21, 1974, which reflects Accounts Receivable - Trade $89,387.83; Accounts

Receivable - Other $4,709.32. Total $94,097.15 (corrected for $500 error in addition).]

XXVII. The liabilities for Accounts Payable reflected upon the books of Frost Corp. as of October 21, 1974 was $18,785.07.

[Exhibit 48(b) - Closing Statement for October 21, 1974 - Schedule I reflects Accounts Payable liabilities open as of October 21, 1974 and assumed by Frost Controls, Inc. - Total $18,785.07, deducted from gross assets to show net assets.]

XLVI. Frost Corp.'s check #4993 issued to Frost Controls Corp. for $90,000 and certified bears the hand-written endorsement:

"Deposit account
Frost Controls Inc.
acct # 41 32 215 04
Frost Controls Corp.
Arthur J. Thomson,
Pres"

[Exhibit 50 - Certified check #4993.]

XLVII. Frost Corp.'s certified check for $90,000 was deposited by Thomson into Frost Controls Inc. account at Old Stone Bank on October 21, 1974.

[Record at trial - Arthur J. Thomson's testimony.]

LXV. On or about June 3, 1975 FNB in performance of the judgment entered in the New Jersey action released and surrendered from pledge to U.E. Co.(Del) the original Certificate #1 for 5,000 shares of Frost Corp. stock as had been

pledged with it by U.E. Co. (Del) on June 14, 1973.

(Exhibit 21(a) - Absolute guarantee by U.E.Co. (Del) of debt of U.E.Co. (NJ); exhibit 21(b) - Frost Corp. Certificate 5,000 shares name U.E.Co. (Del) endorsed in blank; exhibit 41(d) - Judgment U.E.Co. (NJ), U.E.Co. (Del) vs. FNB, June 3, 1975.)

LXXIX. On September 27, 1974, Thomson offered to sell the tangible assets of the Life and Relcoa product lines to Sigma for $300,000 (exclusive of cash and accounts receivable).

(Record at trial - Testimony of Desrochers; deposition of Flynn, P.8 L.16, P.15, L.21.)

LXXX. On September 27, 1974 and on October 8, 1974, Sigma agreed in principle to pay to Thomson $300,000 for the Life and Relcoa product lines.

(Record at trial - Testimony of Desrochers; deposition Flynn, P.15 L.22, P.16, L.13-16.)

LXXXII. On October 21, 1974, Thomson and Frost Inc. acquired the tangible assets of Frost Corp. without "out of pocket" payment (and exclusive of cash and accounts receivable); the $220,000 "purchase price" and the $218,884 net check delivered at closing was a "de facto" transfer of the cash, accounts receivable, and bonus, less payables as follows:

Cash	$ 8,868.00
Certificate of Deposit	75,000.00
Accounts Receivable	112,576.00
Bonus	32,285.00
LESS Payables	(10,799.00)
	$217,930.00

[Exhibit 3K - Frost Corp.'s Financial Report 6/30/74.]

LXXXIV. On February 3, 1975, Thomson and Frost Inc. transferred the Life and Relcoa product lines to Sigma for a total consideration of $300,000 composed of $290,000 sales price and $10,000 consultation contract to Thomson.

[Exhibit 49(i) - Letter agreement Sigma/Frost Inc. 12/26/74.]

XCVI. The book value of the Frost Corp. shares as of June 30, 1972 was approximately $75.00 per share.

[Exhibit 3(a) - Balance Sheet of Frost Corp. as of December 31, 1972 reflects as capital:

Capital Stock	5,000
Paid In Surplus	297,630
Earned Surplus 1971	52,606
Earned Surplus 6/30/72, approx. 1/2 of $37,000 (1972 year)	18,500
	$373,636

5,000 shares at $75= $375,000]

CV. FNB did not have any financial or other information as to the 5,000 shares of Frost Corp. stock, except for the identification contained in the security agreement and for the Frost Corp. Certificate #1 pledged to FNB on June 14, 1973.

[Exhibit M-1, 10/16/80, P.18 L.13-16:
"Q. Did you supply the auctioneer with any information as to the 5,000 shares of Frost Controls Corp.'s stock?
A. No."

P.16 L.23-25, P.17 L.1:
"Q. What information did you have with regard the 5,000 shares of Frost Controls Corp. beyond the information contained in the security agreement?
A. None."]

CVI. FNB retained certificate #1 for 5,000 shares of Frost Corp. stock as endorsed on the back in blank by U.E.Co. (Del) on June 14, 1973 in exactly the same form as pledged from June 14, 1973 to October 21, 1974.

[FNB's admission #4: "Request No. 4. Admit that certificate #1 is the same instrument that was in the possession and control of Third Party Defendant FACTORS AND NOTE BUYERS, INC. on October 21, 1974 and the same had not been surrendered to Frost Controls Corp. for transfer upon its books and records.
Answer No. 4. Admitted."]

CVII. Certificate #1 remained unchanged and in the same form from the date of pledge, June 14, 1973, until it was physically re-delivered by FNB to U.E. Co. (Del) on June 3, 1975, without further endorsement, marks, or alterations of any kind whatsoever.

[Exhibit 21(b) - Frost Corp. certificate 5,000 shares in name of U.E. Co. (Del) endorsed in blank.]

CXIV. By letter of November 2, 1973, Thomson made an application to South Shore National Bank for a loan to assist him in the purchase of Frost Corp. to FNB. The application included the 1971, 1972 Frost Corp. financial statements; 9-month Frost Corp. financial statement prepared by Fraden & Gessman & Co.; Arthur J. Thomson's personal net worth statement; sales projections for Frost Corp.

[Exhibit 2(g) - November 2, 1973 letter by Thomson to South Shore National Bank enclosing Frost Corp.'s financial statements for years 1971, 1972 audited; Frost Corp.'s third quarter - unaudited; personal net worth statement - requesting review - Time of essence.]

CXV. October 26, 1973 or immediately after Thomson engaged Fraden & Gessman & Co. as accountants and auditors for Frost Corp.

[Thomson's admission 864; record at trial - testimony of Arthur J. Thomson and Jack Fraden.]

CXVI. By November 1, 1973, Fraden & Gessman & Co. had prepared formal financial reports for Frost Corp. for the 9-month period ending September 30, 1973, which was based upon Frost Corp.'s trial balance as of September 30, 1973.

[Exhibit 27(n), also 3(a): Financial statement Frost Corp.,

nine months ending September 30, 1973; Exhibit 27(r-8): Trial balance for period ending September 30, 1973; record at trial - Testimony Arthur J. Thomson and Jack Fraden.]

CXVII. Thomson promptly after October 26, 1973, engaged Ralph P. Semonoff and Levy, Goodman, Semonoff and Gorin as attorneys, and on or about November 11, 1973, Semonoff arranged with FNB for an appointment at Newark, New Jersey, for November 20, 1973.

[Exhibit AJT-1 Vol.4 P.64 L.21-24: Record at trial - Testimony Arthur J. Thomson.]

CXVIII. Thomson and Semonoff by appointment met with FNB at Newark, New Jersey, on November 20, 1973, having traveled from Massachusetts to Newark by air that date.

[Record at trial - Testimony Arthur J. Thomson.]

CXIX. At the meeting of November 20, 1973, Thomson made an offer to FNB to purchase the Frost Corp. stock for $165,000.

[Record at trial - Testimony Arthur J. Thomson; Exhibit AJT-1 Vol.4 P.66 L.3-4; Vol.3 P.51 L.10-22:

Q. When did you attempt to buy the company?

A. After I knew that stock was out of the hands of the former owners.

Q. And when was that, please?

A. Mr. Gasparik informed me of it slightly after his auction, sometime after his auction sale

had been concluded. Factors and Note Buyers were our new employers.
Q. And did you make an offer to Factors and Note Buyers for the purchase of the company?
A. I did.
Q. And when did you make such an offer?
A. When we initially went down to find out..."]

CXX. At the meeting of November 20, 1973, Thomson gave FNB a copy of Frost Corp.'s financial report for September 30, 1973, prepared by Fraden & Gessman & Co.

[Record at trial - Testimony of Arthur J. Thomson.]

CXXI. FNB did not have any financial information as to Frost Corp. as of October 26, 1973; the financial report delivered by Thomson was the first information received by FNB as to values in Frost Corp.

[Cfr. Proposed Findings CV and CXX supra; Record at trial - Testimony of Arthur J. Thomson.]

CXXIII. Thomson did not tell Gasparik about the offers to purchase the Frost Corp. stock; Thomson did not travel nor telephone U.E. Co. (Del) office on November 20, 1973, while he was in Newark.

[Record at trial - Testimony of Arthur J. Thomson; Exhibit AJT-1 Vol.4 P.69 L.7-16:
"Q. Did you feel that you were free to purchase Frost Controls Corp.?

A. I didn't know where we stood.
Q. But did you feel that you were free to purchase Frost Controls Corp.?
A. I didn't know at that point.
Q. Did you inquire of Mr. Gasparik as to whether you were free to purchase Frost Controls Corp.?
A. No."]

DATED: February 2, 1981

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ATTORNEYS FOR PLAINTIFFS
AND THIRD PARTY DEFENDANTS

[DISTRICT COURT - CAPTION 76-4150-Z]

PLAINTIFFS' REQUEST #2 FOR FINDINGS OF FACT ON ISSUES OF LIABILITY OF DEFENDANTS, THIRD PARTY PLAINTIFFS-ARTHUR J. THOMSON AND FROST CONTROLS, INC.

CXXVII. When Thomson made the offer to FNB on November 20, 1973 to purchase Frost Corp.'s stock for $165,000 he planned to fund the proposed purchase by

a loan to be obtained from South Shore National Bank secured by Frost Corp.'s liquid assets which were approximately $396,015 and included approximately $102,288 in cash and $81,458 in receivables.

[Cfr. Findings CXIV - November 2, 1973 application for loan to South Shore National Bank, supra;
Cfr. Findings CXXVIII - Frost Corp.'s liquid assets November 1973 approximately $396,015 below.]

CXXVIII. As of November, 1973 Frost Corp. had liquid assets of approximately $396,015 as follows:

	Exhibit 27(n) also 3(b) Frost Corp. Financial Statement as of Sept. 30, 1973.	Est. Average of Exhibits 27(n) & 27(o) as of Nov., 1973	Exhibit 27(o) Frost Corp. Financial Statement as of Dec. 31 1973
Cash in Bank & on Hand	$ 43,474		($ 35,783
Cash - Certificate of Deposit	50,000	$102,288	75,319
Accounts Receivable	81,348	81,458	81,568
Inventory	198,529	209,741	220,953
Prepaid Insurance	3,317	2,528	1,738
Total	$376,668	$396,015	$416,361

CXXX. On October 21, 1974 Thomson and Frost Inc. acquired Frost Corp.'s assets by pledging $426,607 of Frost Corp.'s liquid and tangible assets to secure $135,000 term loan and by taking possession of $83,884 of Frost Corp.'s cash said being part of the proceeds of Frost Corp.'s investment portfolio as had been liquidated and transferred by Thomson into Frost Corp.'s $90,000 certified check payable to itself.

[Cfr. Findings XLVII and XLVIII - As to the $90,000 check used in part to fund the total $218,884 certified check;
Cfr. Findings XLIX and LI supra - As to the $135,000 loan secured by Frost Corp.'s assets proceeds used to fund in part $218,884 check delivered at closing;
Cfr. Findings L supra - As to $218,884 certified check delivered at closing.]

CXXXI. Beginning as early as November, 1973 and continuing through October 21, 1974 Thomson planned to acquire Frost Corp. by pledging and using Frost Corp.'s own assets for this purpose.

[Cfr. Findings CXIV - Thomson's application to South Shore for loan to fund Frost Corp. purchase November, 1973 which included Frost Corp.'s financials, Frost Corp.'s sales projections and Thomson's statement of personal net worth;
Cfr. Findings CXXX - As to acquisition by Thomson and Frost Inc. of Frost Corp.'s

assets utilizing Frost Corp.'s own assets for this purpose.]

CXXXII. At or about October 26, 1973 co-director and officer Flannagan advised Thomson by telephone not to worry about Frost Corp.'s stock.

[Thomson's testimony at trial; Exhibit AJT-1, Thomson's testimony, Vol.3 P.107 L.14-19.]

CXXXIII. Several days after October 26, 1973 Gasparik advised Thomson by telephone that the equipment of U.E.CO. (N.J.) was being sold to satisfy the indebtedness to FNB and that upon sale of the equipment and payment of the debt U.E.CO.(DEL) would get the Frost Corp. stock back.

[Exhibit AJT-1, Thomson, Vol.3 P.60 L.14-24:

Q. But did he at that time indicate to you that it was not a problem that you need concern yourself with, that he would take care of it?

A. He indicated that he was trying to sell equipment to satisfy Factors and Note Buyers.

Q. Yes. And if he did succeed in selling equipment to satisfy Factors and Note Buyers, did he indicate what would happen to the stock of Frost Controls Corp.?

A. <u>He indicated</u> at one point, I believe, in our conversation that <u>he was going to get it back</u>."

(Underscoring supplied.)]

CXXXIV. In November/December, 1973

Fred D. Gearhart, an 8 percent stockholder of G.E. Inc., went to Bellingham, Massachusetts to meet with Thomson and explore methods of getting Frost Corp.'s stock back to U.E.CO.(DEL).

[Arthur J. Thomson testimony at trial; Exhibit AJT-1, Vol.5 P.67 L.1-7.]

CXXXV. Gearhart's contacts with Thomson were numerous, vigorous and Gearhart wanted to bring Court action or strong actions to restore Frost Corp. to U.E.CO.(DEL).

[Arthur J. Thomson's testimony at trial; Exhibit AJT-1, Vol.5, P.67; AJT-1, Vol.5 P.63 L.7-10; "Mr. Gearhart indicated that he was going to bring very strong action to getting the company back into the control of United Electronics."

AJT-1, Vol.7 P.82 L.8-15 "The contest that I believe was made reference to was the fact that Mr. Gearhart, as a major stockholder, had made quite a few statements that he was going to try to do something to protect his stock in General Electronics as a major stockholder."]

CXXXVIII. Gearhart called the meeting of January 10, 1974 at Boston to explore possible commencement of litigation against FNB to restore the Frost Corp. stock back to U.E.CO.(DEL). Gearhart was accompanied to the meeting by his attorney Daniel Greenberg of the firm of Friedman, Fischman and Chikofsky, to suggest a feasible plan of

legal action and to receive a retainer.

[Testimony at trial Thomson; testimony at trial Gasparik.]

CXXXXIV. At the January 10, 1974 meeting Gasparik repeated his prior statements that he was engaged in the sale of U.E.CO.(N.J.)'s machinery and equipment and would obtain release of the Frost Corp.'s stock from FNB upon payment in full of the indebtedness to FNB.

[Testimony at trial Michael T. Gasparik; testimony at trial Arthur J. Thomson; Exhibit AJT-1, Vol.4 P.69 L.13-24 P.70 L.1-2:

Q. Did you inquire of Mr. Gasparik as to whether you were free to purchase Frost Controls Corp.?

A. No.

Q. Why not?

A. Mr. Gasparik had informed me that we were the property of Notes and Factor Buyers and they owned the stock of Frost Controls.

Q. Did he also tell you that he was going to obtain a release of the stock from the sale?

MR. GARDENER: Objection. He stated I don't know how many times, Angelo, that Gasparik told him that he would attempt to, by selling off assets, to get it back."]

CXXXXV. In furtherance of his plans to restore Frost Corp. to U.E.CO.(DEL) Gearhart placed Thomson in contact with Poppele, a director and small stockholder of G.E.Inc.; with E.V. Otis,

a 5 percent stockholder of G.E. Inc.; and with Eldridge, who communicated orally and in writing with Thomson.

[Testimony at trial Arthur J. Thomson; Exhibit 3(f) Correspondence exchange Eldridge and Thomson 2/26/74 and 3/11/74; Exhibit AJT-1, Vol.5 P.67 L.8-24:

"I believe there was a Mr. Eldridge in there. Mr. Greenberg was going to try to bring suit. There was some other gentleman that he referred to in Long Island who is a dentist. He apparently had 50,000 shares. He tried Mr. Otis, who as a rather older gentleman, apparently. He tried Mr. Poppele. He had me speak to all three people, all trying to get something done.

Q. Did you ever meet Mr. Otis?

A. No, I never met with Otis.

Q. Did you ever meet Mr. Poppele.

A. No, I never met Mr. Poppele.

Q. How did you talk with Mr. Otis?

A. I talk to him by telephone.

Q. Did he call you or did you call him?

A. No. He called me initially. He at that time told me he loved Cape Cod. He was a director."]

CXXXXVI. Beginning November/December 1973 and continuing through 1974 G.E. Inc and U.E CO.(DEL) through Gearhart and his associates continuously solicited Thomson's aid, assistance and cooperation as President and Director of

Frost Corp. to oppose FNB's continued possession of Frost Corp.'s stock.

[Cfr. CXXXIV, CXXXV, CXXXVI, CXXXIX, CXXXXII, CXXXXV, Findings supra.]

CXXXXVIII. Beginning October 26, 1973 and continuing into 1974 U.E.CO. (N.J.) and U.E.CO.(DEL) through Gasparik employed non-litigious means to regain to U.E.CO.(DEL) possession of its Frost Corp.'s stock.

[Cfr. CXXXIII Findings supra; Cfr CXII Findings supra - As to realization by FNB of $49,957 from individual lot sales of assets after October 26, 1973; Cfr CXXXXVII Findings supra.]

CLIII Thomson by supplying FNB on November 20, 1973 with financial information as to Frost Corp.'s worth interfered with the contractual efforts of U.E.CO.(DEL) to regain possession of the Frost Corp.'s stock.

[Cfr CV Findings supra - On October 26, 1973 FNB had no financial information as to Frost Corp.; Cfr CXX Findings supra and CXXI Findings supra.]

CLIV. Thomson, by making an offer to FNB on November 20, 1973 to purchase the Frost Corp.'s stock for $165,000, interfered with the contractual efforts of U.E.CO.(DEL) to regain possession of the Frost Corp.'s stock.

[Cfr CXIX Findings supra - Thomson made offer to FNB on November 20, 1973' to purchase Frost Corp. for $165,000; Cfr CV Findings supra - FNB had no financial or other information as to Frost Corp.'s stock.]

CLV. By making the offer on November 20, 1973 to FNB to purchase the Frost Corp.'s stock for $165,000, Thomson was in direct competition with U.E.CO. (DEL)'s efforts through Gasparik to regain possession of the Frost Corp.'s stock; and also in direct competition with U.E.CO.(DEL)'s efforts through Gearhart and Associates to regain possession of Frost Corp.'s stock.

[Cfr CXIX Findings supra - As to offer to purchase for $165,000; Cfr CXXXXVIII Findings supra - As to efforts of U.E.CO.(DEL) by Gasparik to recover Frost Corp.'s stock; Cfr CXXXXVI Findings supra - As to efforts of Gearhart and Associates to recover Frost Corp.'s stock.]

CLVI. Thomson's efforts to obtain the Frost Corp.'s stock for himself were covert, secretive and concealed from U.E.CO.(DEL) through Gasparik, and concealed from U.E.CO.(DEL) through Gearhart and Associates.

[Cfr CXXIII Findings supra - As to concealment from U.E.CO. (DEL) - Gasparik; Cfr CXXXVIII Findings supra - As to purported cooperation with Gearhart in opposition to FNB by participation at the January 10, 1974 meeting; Cfr CXXXV and CXXXVI Findings supra - Continuous contact with Gearhart 1973 and 1974 in purported support of Gearhart's efforts to regain Frost Corp.'s stock; Exhibit 3(f) - Correspondence exchange 2/26/74 and 3/11/74 with Eldridge in purported

support of G.E. Inc.'s stockholder efforts to regain Frost Corp.'s stock.]

CLVII. At trial Thomson did not offer any evidence on the issue of fairness of his activities undertaken in competition with U.E.CO.(DEL)'s attempt to recover to itself the Frost Corp.'s stock.

[Record at trial.]

CLVIII. U.E.CO.(DEL) continued its efforts to regain possession of Frost Corp.'s stock and in February, 1975 U.E. CO.(DEL) together with U.E.CO.(N.J.) instituted litigation in the New Jersey Courts against FNB seeking recovery of the Frost Corp.'s stock as well as all other excess pledged collateral, other assets and damages.

[Exhibit 41(a) - U.E.CO.(N.J.) and U.E.CO.(DEL) complaint against FNB in litigation commenced February, 1975.]

CLIX. As of June 3, 1975 U.E.CO. (N.J.) and U.E.CO(DEL) successfully concluded their litigation in the New Jersey Courts, recovered possession of the Frost Corp.'s stock together with all other excess pledged collateral and other assets.

[Exhibit 41(d) - Judgmept U.E. CO.(N.J.) and U.E.CO.(DEL) against FNB entered June 3, 1975 in New Jersey Courts returning surplus pledged collateral including Frost Corp.'s stock to U.E.CO.(N.J.) and U.E.CO.(DEL).]

CLX. In May / June, 1974 active

contacts between Thomson and FNB resumed.

[Exhibit 3(g) - Semonoff letter to FNB May 13, 1974 inquiring proof of authority of FNB as to Frost Corp.; Exhibit 3(h) and Exhibit 51(c) - Letter Schondorf replying May 17, 1974 remitting copy of security agreement [Exhibit 20(a)]; advertisement [Exhibit 28]; guarantee of U.E.CO.(DEL) [Exhibit 21(a)]; stock certificate [Exhibit 21(b) as to evidence of title.]

CLXI. The documents submitted by Schondorf to Semonoff on May 17, 1974 as 'evidence of title' were deficient as such and did not constitute 'proof of title'; they were merely the original pledge instruments delivered by U.E.CO. (DEL) on June 14, 1973 to FNB and a published notice of possible sale.

[Exhibit 3(b) - Letter of Schondorf:

"May 17, 1974

Dear Mr. Semonoff:

This will confirm my conversation with you today regarding Frost controls.

I enclose for your inspection permanent copy of Security Agreement, Guarantee, Advertisement and Stock Certificate.

Factors and Note Buyers, Inc. were the purchasers of the Frost Controls Stock at the

auction sale.

I trust the enclosure satisfies the inquiry.

Very truly yours,

MARVIN SCHONDORF"]

CLXII. The deficiency of the documents submitted by Schondorf as evidence of 'transfer of stock' was noted by Semonoff in his June 4, 1974 opinion letter which accepted this deficiency as sufficient " in the absence of any contest by an appropriate party in interest".

[Exhibit 3(i) - Letter of Levy, Goodman, Semonoff & Gorin, Esqs. to Frost Controls Corp.:

"June 4, 1974

Gentlemen:

I have examined the documents submitted by Mr. Schondorf on behalf of his client relating to the transfer of stock.

While there is a question in my mind as to the formal requisites being complied with in regard to the transfer and also as to the stock certificate complying with the by-laws of the corporation, I believe they are sufficient to justify your recognizing Mr. Matathias as owner of the stock in the absence of any contest by an appropriate party in interest.

I am, therefore, confirming my advice to you that you give Mr. Matathias at this time the co-operation he has requested.

Very truly yours,

Ralph P. Semonoff"]

CLXIII. Semonoff was present at the January 10, 1974 meeting and was aware of the opposition of U.E.CO.(DEL) by Gasparik as to FNB's possible claim of title transfer.

[Cfr CXXXXIV Finding - Opposition of U.E.CO.(DEL) by Gasparik at January 10, 1974 meeting to FNB's possible claims.]

CLXIV. Semonoff was present at the January 10, 1974 meeting and was aware of the opposition of U.E.CO.(DEL) by Gearhart as to FNB's possible claim of title transfer.

[Cfr CXXXV and CXXXVIII Findings - Opposition of U.E. CO.(DEL) by Gearhart at January 10, 1974 meeting to FNB's possible claims.]

CLXV. Semonoff exchanged correspondence with Eldridge and was aware of the opposition of U.E.CO.(DEL) by Eldridge to FNB's possible claim of title transfer.

[Exhibit 3(f) - Correspondence exchange Eldridge, Thomson and Semonoff 2/26/74 and 3/11/74.]

CLXXXV. In early part of September, 1974 Sigma through Leo R. Flynn, its president and chairman of the Board,

solicited from Thomson, as president of Frost Corp. the possible purchase of all of Frost Corp.'s assets.

[Deposition Flynn, September 26, 1977, P.8 L.5 through P.9 L.8:

Q. Did you know a Mr. Thomson?

A. Only up until the time I contacted him concerning Frost. Prior to that, I didn't know him at all.

Q. Do you recall when you contacted him?

A. Yes. I looked in my records and if I might refer to some notes, my recollection looking at my appointment book, sometime prior to September 27, 1974. When I say sometime prior, I am saying within a week or two weeks prior to that date. I phoned, had a telephone conversation with Mr. Thomson, and out of that telephone conversation we made a luncheon engagement for September 27, 1974. That was my first contact, the first time I met him face to face, and the phone conversation would have been the first time I talked to him.

Q. Do you recall where you phoned him?

A. I have called him at the Frost office.

Q. Do you recall where that was?

A. Bellingham, Mass.

Q. Do you recall the reasons for making the call to Mr. Thomson?

A. Yes, very clearly. We were

interested in seeing if we could buy either the company Frost or we could purchase what we called a Series 70.

MR. DESROCHERS. Cradle.

A. A Series 70 cradle relay from them, and that was the purpose of me contacting him to see if we could buy the company or buy the product line from him.]

CLXXXVI. On September 27, 1974, Thomson and Flynn (Sigma) agreed upon a sales prices of $300,000 for Frost Corp.'s relay switching devices consisting of the Life and Relcoa product lines.

[Record at trial - Testimony of Desrochers; Cfr LXXIX and LXXX Findings supra; Deposition Flynn 9/26/77, P.15 L.18 through P.16 L.3:

Q. Do you recall anything about price?

A. Oh, certainly.

Q. As of that time?

A. Yes. I believe he wanted $300,000, and I said, "If you have what we want, we will pay you $300,000."

Q. It was that simple?

A. Just that simple. We knew what we wanted. Already had his product. We had analyzed whether or not they fit into our game plan. It was as simple as that.]

CLXXXVII. Thomson retained to himself the corporate opportunity represented by Sigma's offer of purchase of Frost Corp.'s assets.

[Record at trial - Testimony of Arthur J. Thomson.]

CLXXXIX. Thomson did not reveal the Sigma offer of purchase to U.E.CO.(DEL) through Gasparik, Gearhart, E.V. Otis, Poppele or Eldridge.

[Record at trial - Testimony of Arthur J. Thomson.]

Dated: February 28, 1981

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